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The Law

The Law of Languages in Canada

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The Law of Languages in Canada

Claude-Armand Sheppard

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The general purpose of this research project was to determine the manner in which the various Canadian jurisdictions—federal, provincial, territorial, and municipal—regulate the use of languages. Its result has been to establish what linguistic rights are recognized in Canada.

Our intention was not only to examine all relevant constitutional and statutory provisions, as well as all pertinent administrative regulations and even municipal by-laws, but also to discover how such legislation worked in reality and what practices, if any, had filled gaps in the law or supplemented government regulations.

Within this broad frame of reference, we studied in detail the following subjects: (1) how the legislative process functions at both the parliamentary and subordinate levels; (2) the language of court proceedings and of juries; (3) the use of languages before federal and Quebec quasi-judicial tribunals; (4) what recognition municipalities in Quebec and in New Brunswick give to the bi-ethnic composition of their societies; (5) the language of official communications, forms, and returns, and of some other official and semi-official activities; (6) the language of federal-provincial agreements and of international agreements entered into by Canada. On the strength of our findings we then ventured to express conclusions on the official status of French and English in every one of the aforementioned jurisdictions.

On the other hand, for a number of practical reasons or because they were covered by parallel research projects, we did not examine the actual operations of Parliament, the Supreme Court, the Public Service, or the various educational systems, although passing references have been made as the need arose to legislation in these highly important areas.

Furthermore, while our approach was as objective and dispassionate as humanly possible, and while we tried to avoid even indirect commitments to any political or ideological concepts, we considered it our duty not only to point out shortcomings or contradictions in the law but also to outline desirable technical reforms and to suggest possible formulae for more fundamental constitutional changes. However, ours has been basically an analytical study rather than an exercise in formulating policy.

The material in this report is organized into the following parts: 1, "The Legal History of Bilingualism in Canada"; 2, "Jurisdiction over Languages in Canada"; 3, "Legislating in Two Languages" (including subordinate legislation); 4, "The Conduct of Justice in Two Languages" (bilingual justice, mixed juries, and quasi-judicial boards and commissions); 5, "The Law of Bilingual Administration" (municipal affairs, communications with the authorities, notices, forms, and corporations); 6, "The Language of International and Federal-Provincial Agreements"; and 7, "The Official Status of Languages in Canada."

Each part contains one or more chapters. Each chapter is divided in sections which are numbered according to a decimal system: the first digit or digits are those of the chapter followed by the consecutive number of the section (e.g. 5.06 refers to section 6 of Chapter V). All references and cross-references are to section numbers rather than to pages. Abundant cross-references have been provided.

The precise methods of research used have been described at the beginning of each chapter whenever such discussion seemed advisable. Further remarks will also be found in the bibliography. In brief, the basic initial research was conducted by four research assistants, with our help and under our supervision. In addition to the usual material covered by legal research (statutes, regulations, ordinances, jurisprudence, legal periodicals, treaties, and other theoretical writings), we made extensive use of personal interviews with a large number of officials, and tabulated statistically and analyzed the replies to hundreds of questionnaires. These questionnaires themselves were drafted with the assistance of experts and the samplings used were as representative as possible and generally satisfactory. We also resorted constantly to statistical data provided by the 1961 Census of Canada. No systematic search was made of newspaper sources, but press despatches have been quoted when available and relevant. Finally, we had some limited but fruitful inquiries made in the federal and provincial archives.

Still, in all objectivity, we must confess that some parts of this report are far from exhaustive. While we cannot apologize for personal shortcomings, we must underline the somewhat adverse conditions under which this research project was conducted. The project itself was not conceived until April 1965. The entire basic research was completed in less than *four* months, although the report incorporates some materials obtained earlier by a research assistant and some studies made in the fall of 1965. These findings had to be organized and the report drafted in an additional period of less than three months.

Furthermore, we were hampered by the lack of published material in this relatively unexplored field and by the absence of general studies in Canada on almost all the subjects covered. Such statutory provisions, regulations, jurisprudence, and legal writings as we were able to find were generally indexed improperly or not at all in the legal indexes, and had to be found by actual manual search of literally thousands of volumes. Lack of time and adequate facilities also hamstrung us in following up new avenues of research. Nor were we able to make use of the findings of the many germane projects being carried out under the sponsorship of the Commission. In other words, we consider this report, voluminous though it is, to be no more than a preliminary survey of an extremely complex and important field of law.

While this report was submitted to the Royal Commission on Bilingualism and Biculturalism on January 18, 1966, it was substantially revised for publication and incorpo-

rates all, or nearly all, legislative and judicial developments up to the end of October 1967. Every effort has been made to update this work.

Whenever possible, quotations are in the original language and spelling. Translations into English of all French quotations are provided in the text; the original French may be found in the notes at the end of the book. Except where there are indications to the contrary, all translations are our own.

Acknowledgements

It would be impossible to acknowledge individually the kind and co-operative assistance received from the hundreds of M.P.s, M.P.P.s, M.L.A.s, government officials, judges, and magistrates who granted interviews, completed questionnaires, and replied to our insistent letters. Many of them requested anonymity and to name only some of them would be unfair to the others.

A special acknowledgement should be addressed to the four research assistants—Messrs Claude de la Madeleine, Armand de Mestral, Bill Fraiberg, and Steve Kleiner—some of whom have since joined the ranks of the Quebec Bar, and who waded through innumerable dusty tomes of statutes, regulations, and legal writings and processed mountains of questionnaires. To an inestimable extent, the success of this report is due to their imaginative and steadfast research. Mr. Abraham Slawner ably assisted in updating this report.

We should also like to express our gratitude to the officials of the libraries of the Bar of Montreal and of the Law Faculty of McGill University who made it possible for us to conduct this research in the most efficient manner possible and favoured us with a very generous interpretation of their internal regulations.

This study would not have been completed had it not been also for the devotion, away beyond the call of normal secretarial duty, of several secretaries in our law firm, and more particularly of our own two secretaries Mrs. Lise MacDonald and Miss Claudine Proutat.

Montreal, November 14, 1967

Claude-Armand Sheppard

1.01. The purpose of Part 1 of this study is to furnish a general historical background against which the various specific subjects studied in this project may be examined. We have tried to write a legal history of bilingualism in Canada. This history is mainly concerned with areas such as the language of legislation, the use of languages in court proceedings, and mixed juries. We believe that this part is indispensable for a proper understanding of our report since it traces the evolution of the various institutions we have surveyed.

While most of the material is not new and represents not the fruits of original research in the scientific sense, but rather a compilation, collation, and synthesis of existing printed sources, we believe that we can claim to have trod relatively unexplored territory in our detailed search of statutes and in our study of the West and of the Yukon and Northwest Territories. For instance, our research shows more than a little bilingualism in Rupert's Land and in the Northwest Territories. We have found conclusive evidence (notwithstanding the prevailing contrary opinion) that French was probably never legally abolished in either the Northwest Territories or the Yukon. In fact, even in Alberta and Saskatchewan, the legal status of French is far from clear. Beyond this we make no greater claim for this part than to say that it is perhaps the first systematic synthesis of the legal history of bilingualism in this country.

A. Nova Scotia

1.02. By Article XII of the Treaty of Utrecht signed by Louis XIV and Anne of Great Britain on April 11, 1713, Acadia, until that date mainly a French possession, became a British colony. Louis XIV ceded to Great Britain:

all Nova Scotia or *Accadie* [sic], with its ancient Boundaries, as also the City of *Port Royal*, now called *Annapolis Royal*, and all other things in those Parts, which depend on the said Lands and Islands . . . and . . . the Subjects [of Louis XIV] shall hereafter be excluded from all kind of Fishing in the said Seas, Bays, and other Places, on the Coasts of *Nova Scotia*, that is to say, on those which lye towards the East, within 30 Leagues, beginning from the Island commonly called Sable, inclusively, and thence stretching along towards the South-West.¹

The French population of Acadia, which had been limited to a few hundreds in 1671, the last year in which immigrants from France had arrived, had reached about 1,700 at the time of the signing of this treaty.²

1.03. At first, Acadia was a British colony only in name, for until 1749 the only English inhabitants were a few soldiers and merchants at Annapolis and Canso, augmented in the latter village by a transient fishing population.³ Government was largely a matter of supervising the Acadians who constituted almost the entire population.⁴ In fact, even after 1713, the French-speaking Acadian population continued to double every 16 years despite departures and persecutions.⁵ By 1749, it numbered about 10,000.⁶

The Acadians continued to be as apathetic to political and military matters under their British masters as they had been under the French. They disregarded official regulations and maintained a form of rudimentary self-rule.⁷ The Board of Trade, the organ of British government entrusted with the administration of the colonies, does not appear to have adopted any definite policy towards them. Nevertheless, the Board decided to guarantee the constitutional rights of Englishmen as a means of attracting settlers to the new possession and in 1719 furnished Governor Phipps with a new Commission and

Instructions, requiring that an Assembly be called. However, the first Assembly was not convoked until 1758. Until that time, the colony was governed by means of proclamations of the Governor and of his Executive Council. Meanwhile, prior to 1755, "native instruments of government" evolved, the purpose of which was to provide a regular channel of communication between the governors and the local population. As early as 1710 the Acadians had sent emissaries to deal with the new masters who, realizing the need for persons to receive and see to the execution of their orders, proceeded to regularize their election and functions. These emissaries provided a form of Acadian self-government and at the same time served as buffers between the Acadians and the English.⁸ During the makeshift government between 1710 and 1749 the Acadians were able to communicate with the administration through their own representatives, and hence it might be said that to that extent the French language continued to be recognized under the British.

1.04. The policy of English settlement of Acadia began in earnest in June 1749, when Cornwallis arrived at Chebucto with 2,546 British settlers.⁹ By 1755—the year of the mass deportation of the Acadians—the English population had grown to around 3,000. In 1766 it was 9,000; in 1767, 13,374; and by 1774 it had reached a total of 17,000, a figure, however, which must be deemed to include 1,265 Acadians.¹⁰ This policy of greatly increased English settlement, combined with the expulsion of the Acadians, eventually gave Nova Scotia a predominantly English stamp which it maintains to the present day.

1.05. From 1749 on the French language ceased to enjoy any legal status whatever. Nevertheless, the legal basis for official unilingualism in Nova Scotia is to be found in the constitution of that province which was embodied in the Commission and Instructions to Edward Cornwallis issued on May 6, 1749, rather than in the expulsion of the Acadians.

Two means of granting a colonial constitution existed at that time: under royal prerogative or by parliamentary statute. Although the competence of Parliament to enact a constitution for a colony was never in question, at first there was serious doubt as to the authority of the Crown to do the same.¹¹ The case of *Campbell v. Hall*¹² settled that the Crown alone had the power to legislate for a conquered country, subject to the terms of capitulation or of the treaty of peace and subordinate to the authority of Parliament. Nothing in the Treaty of Utrecht had guaranteed to the Acadians the continuation of their language or of French laws. As Lord Mansfield wrote in *Campbell v. Hall*:

It is left by the constitution to the King's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is entrusted with making the treaty of peace: he may yield up the conquest or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion.¹³

By the above-mentioned Commission and Instructions to Cornwallis, English law was introduced to Acadia. With respect to the grant of legislative power the Commission provided as follows:

And you the said Edward Cornwallis with the advice and consent of our said Council and Assembly or the major part of them respectively shall have full power and authority to make, constitute and ordain Laws, Statutes and Ordinances for the Public peace, welfare and good government of our said province and of the people and inhabitants thereof and such others as shall resort thereto & for the benefit of us our heirs and Successors, which said Laws, Statutes and Ordinances are not to be repugnant but *as near as may be agreeable to the Laws and Statutes of this our Kingdom of Great Britian*.¹⁴

The Commission also stipulated that the rule of decision in the courts was to be in accordance with the law of England, where the use of any foreign language, and particularly French, in judicial proceedings and official records had been completely abolished by statute in 1731.¹⁵ By implication, this statute was part of the law of Nova Scotia; hence English can be deemed to have become the sole official language of the colony.

1.06. The Legislative Assembly of Nova Scotia was first convened on October 2, 1758. Although there was never any provision as to the language of debate or record, English was always assumed to be the official language, and in any case the French-speaking Acadians were barred from membership in the Assembly by the anti-Catholic Test Act.¹⁶ From the time of the first Legislative Assembly in 1758 to Confederation, not a single Nova Scotia statute is to be found conferring any legal recognition whatever on the French language. Only English had legal status.

B. Prince Edward Island

1.07. Prince Edward Island, once known as St. John's Island, received its constitution in the form of a Commission of August 4, 1769, and Instructions of July 27, 1769, to Governor Patterson. These documents were essentially similar to those issued in 1749 to Cornwallis for Nova Scotia. With regard to judicial institutions, there were express instructions to follow the Nova Scotia model.¹⁷ Therefore, while there was never any express provision to that effect, English may be taken to have become, and to have remained the official language of Prince Edward Island. It is worth noting that no provisions governing the status of any language are to be found in the pre-Confederation statutes of Prince Edward Island.

C. New Brunswick

1.08. The New Brunswick constitution originates in the Commission of August 16, 1784, and the Instructions to Governor Thomas Carlton.¹⁸ They were similar to those issued to Cornwallis for Nova Scotia. Prior to its creation as a separate province, New Brunswick had been a part of Nova Scotia, and the form of government established for New Brunswick was substantially identical to that of the older province. As in Nova Scotia, there was no express statutory provision governing the use of any language. However, we may conclude that by virtue of custom and usage as well as the importation of English law into New Brunswick, English became and remained the official tongue of

that province. Before Confederation there were no legal provisions whatever governing language rights. Our research has disclosed only one statute dealing with the French-speaking inhabitants of New Brunswick and it had nothing at all to do with the use of any language. It was entitled An Act relating to French Paupers in the Parish of Dorchester in the County of Westmorland.¹⁹

At the time of writing this study there is pending before the Legislative Assembly of New Brunswick Bill 53, designed to amend the Evidence Act²⁰ by enacting a new section 23c which would permit a judge, if all the parties to a judicial proceeding and their counsel have a sufficient knowledge of one or the other language, to order that the proceedings be conducted and the evidence given and taken in the language that is selected. It is obvious that this provision will legalize the present practice in certain New Brunswick jurisdictions of conducting court cases in French.²¹

A. Introduction

1.09. The present chapter is devoted to a study covering the period from 1760 to Confederation, of the law of bilingualism in the area now known as Quebec and Ontario, and at one time as Lower and Upper Canada. We have not thought it necessary to survey the French Regime as under it the community was a homogeneous French-speaking one which had reached about 60,000 souls by the time of the conquest. Since there were no English inhabitants, all legal matters were transacted in French. However, with the British military occupation in 1760 and the gradual influx of English-speaking immigrants, important changes occurred.

1.10. The British Regime (1760-91) will be surveyed first. It saw three governments: the military (1760-63), the civil (1763-74), and the Legislative Council (1774-91). We shall then study the half century spanning the Constitutional Act of 1791 and the Act of Union of 1840 which reunited Upper and Lower Canada. We shall conclude with an examination of the Confederation debates leading up to the British North America Act of 1867.²²

B. The British Regime, 1760-91

1.11. From 1760 to 1791 when the Constitutional Act divided Canada into Upper and Lower Canada, the province of Quebec was administered under three different successive forms of government: 1) a military government composed of the commanding general of the British troops and the governors of Quebec, Montreal, and Trois-Rivières (1760-63); 2) a form of civil government composed of a council exercising legislative, executive and judicial powers and consisting of the governor general residing at Quebec, his lieutenant-governors at Montreal and Trois-Rivières, the chief justice, customs inspectors, and eight persons chosen from among the most notable inhabitants, only one of the latter being a

Canadian (1763-74); and the Legislative Council established under the Quebec Act of 1774 and composed of 23 members of whom one-third were Roman Catholic Canadians (1774-91).

This period of three decades is of great importance in the legal history of bilingualism, for, while no text of positive law gave the French language an official status, neither was there any which abrogated its use and replaced it with English as the official language of the colony. Furthermore, the communications and practices of the British administrators offer strong evidence that the use of French was to continue in the public institutions of Canada.

1. Military regime, 1760-63

1.12. With the signature of the Articles of Capitulation of Montreal on September 8, 1760, all resistance ended and possession of Canada was taken by the British forces. The Articles of Capitulation of Quebec had been signed on September 18, 1759. No provision of the Articles of Capitulation of either Quebec or Montreal makes mention of the status to be accorded to the French language. Article 2 of the Quebec Articles states "that the inhabitants shall be preserved in the possession of their houses, goods, effects and privileges." To which the reply of the British was: "Granted, upon their laying down their arms."²³ It is conceivable that the continued use of the French language could be deemed to fall within such "privileges," but in the historical context of the Articles this interpretation is somewhat strained. Article 42 of the Articles of Capitulation of Montreal demanded that "The French and Canadians shall continue to be governed according to the custom of Paris, and the Laws and Usages established for this country; and they shall not be subject to any further taxes other than those established under French rule." To which the laconic British reply was "They become subjects of the King."²⁴

As will be explained later, however, this reply must not be taken to indicate that it was the intention of the conquerors to abrogate the French laws or language. Indeed it was the intention of the British to retain the records, all in the French language, of the courts of the former regime, as may be seen from the terms of article 45 of the Articles of Capitulation of Montreal:

The registers and other papers of the Supreme Council of Quebec, of the administration and admiralty of the said city; those of the Royal jurisdictions of Trois-Rivières and Montreal; those of the Seigneurial jurisdictions of the colony; the minutes of the acts of the notaries of the towns and country districts; and, in general, the acts and other papers, that may serve to prove the condition and fortune of the citizens, shall remain in the colony, in the records of the jurisdictions to which these papers belong.

The British reply was, "Granted."²⁵

The British thus ensured continuity in the administration of justice by having available for consultation the precedents and records of the previous regime, all of them, of course, entirely in the French language. It is highly doubtful, however, that any consideration was given to linguistic matters at this early stage.

1.13. Steps towards the regular administration of the law were promptly taken in the conquered territory. Colonel Young was appointed civil and criminal judge in the town of Quebec. On January 16, 1760, General Murray, the Commander-in-Chief of the British troops in the St. Lawrence area, issued a commission in the French language to Sir Jacques Allier, making the latter civil and criminal judge in "The Parish of Belletier and those lying beyond as far as Kamouraska, inclusive." Thus was appointed the first French Canadian judge under British rule.²⁶

1.14. Immediately after the capitulation of Montreal, General Amherst, Commander-in-Chief of the British forces in North America, took measures for the establishment of a provisional military government. He retained the French division of the province into the three administrative districts of Quebec, Trois Rivières, and Montreal. On September 16, 1760, Colonel Burton was made Governor of Trois-Rivières and on September 22, Brigadier-General Gage, of Montreal. Murray was already Governor of Quebec.

1.15. On September 22, 1760 Amherst issued a proclamation at Montreal in the French language announcing the appointment of Gage and Burton, and authorizing the governors "to nominate persons to all posts vacant in the militia and to begin by signing commissions in favour of those who have lately enjoyed such posts under His Most Christian Majesty."²⁷ The proclamation entrusted the administration of justice to the militia in the following terms:

That in order to settle amicably as far as possible all differences which may arise among the inhabitants, the said governors are charged to authorize the commanding militia officer in each parish or district, to hear all complaints and if they are of such a nature that he can settle them, he shall do so with all due justice and equity; if he cannot reach a decision, then he must refer the parties to the commanding officer in his district, who shall in like manner be authorized to decide between them if the case is not sufficiently serious to require its being brought before the governor himself, who in this, as in every other case, shall administer justice where it is due.²⁸

The militia had been organized during the French regime by Governor Frontenac to supplement the royal troops stationed in New France. All able-bodied men, with the exception of a few officials, were required to serve in the militia. The militia captain in each parish became the local representative of the central government in civil as well as military matters.²⁹ By entrusting the administration of justice at Montreal and Trois-Rivières to militia officers, the British thereby ensured that disputes would be tried by inhabitants who enjoyed the greatest respect and who understood the language of the litigants.

1.16. On October 1, 1760 Governor Burton posted General Amherst's ordinance at Trois-Rivières, and accompanied it with one of his own in French in which he enjoined the militia officers or captains to decide all suits brought before them with justice and free of charge.³⁰ On October 6, 1760 he wrote a letter to all the captains of the militia to accompany his own ordinance and that of Amherst. In it he said, "The good reputation that you enjoy persuades me that I would have reason to be pleased with the care you have taken to make peace and harmony reign in your parish."³¹ The militia officers were not commanded to decide according to any particular system of law but "following the

light of your reason and in accordance with all justice and right. . . .”³² Moreover, a right of appeal to the local British commander in the parish was established.³³

1.17. In Montreal Governor Gage entrusted the administration of justice to the local militia officers by an ordinance issued on October 28, 1760. This ordinance also provided for a right of appeal to the officers commanding the British troops in the district or canton where the parties resided. The procedure for appeal is of interest: “. . . all appeals made before us should be presented in writing, and *placed in the hands of our secretary*; and the day that we shall designate to hear and decide them will be published and posted. . . .”³⁴

The provision is significant because Governors Murray, Burton, and Gage each appointed a French-speaking Swiss as his secretary—Hector-Théophile Cramahé at Quebec, J. Bruyères at Trois-Rivières, and G. Maturin at Montreal. This ensured that the representatives of the British Crown could make themselves understood in dealing with the population. For their part the Canadians were able to communicate in their own language with the administration.

1.18. On October 31, 1760 Murray established a judicial system at Quebec differing from those at Trois-Rivières and Montreal. The administration of justice was placed in the hands of a seven-man military council instead of the local militia officers. The decisions of the soldier-judges were final, although Murray reserved the right to refer any of their decisions to his own military council.³⁵

Murray appointed seven military councillors.³⁶ Although not one of these was a Canadian, four (Major Augustin Prévost, Hector Théophile Cramahé, Jacques Bazbult, and Edmond Mabane) bore French names. Also, on the same day, Murray commissioned Jacques Belcourt de la Fontaine, a prominent Canadian lawyer, as his Attorney General for the entire south shore of the Quebec district.³⁷ A similar commission was issued to another prominent Canadian lawyer, Joseph-Étienne Cugnet, for the north shore.³⁸ Under the terms of their commissions both Attorneys General were to be aided in their functions by the Chief Clerk of the Superior Council at Quebec or by clerks they were empowered to commission. The Chief Clerk was Jean Claude Panet, a former soldier in the French navy who had emigrated to Canada in 1740.³⁹

1.19. On October 31, 1761 Governor Gage streamlined the administration of justice in the Montreal area by subdividing the militia courts into five distinct district tribunals.⁴⁰ In each of these he established a *Chambre de Justice*, composed of no more than seven or less than five officers of the militia, who were to arrange among themselves their turns of duty. Each court sat every 15 days, and an appeal could be made to one of three councils of British officers which sat for this purpose on the twentieth of every month at Montreal, Varennes, and St. Sulpice. From these councils a final appeal lay to the Governor himself. Provision was also made to ensure that the judgements of the five courts and the Governor’s ordinances (both issued in French) would be adequately preserved.

1.20. The King approved of the general system of justice and administration established by Amherst at Montreal and Trois-Rivières and by Murray at Quebec. This approval was conveyed through the Earl of Egremont, the Secretary of State, in a dispatch to Amherst, dated December 12, 1761.⁴¹ This letter is noteworthy for its enjoinder to the

Governors that they issue strict orders to British personnel forbidding them to insult the language, dress, customs, and country of the inhabitants.

1.21. On May 8, 1762 Governor Burton was relieved temporarily of the administration of Trois-Rivières in order to return to the army. His successor was Frederic Haldimand, a Swiss infantry colonel in the service of the British army. Haldimand published an ordinance on June 5, 1762, whereby the government of Trois-Rivières was divided for the purposes of the administration of justice into four districts.⁴² In each district he established *chambres d'audience*, consisting of three to five militia officers presided over by a captain. Article 9 of this ordinance ensured that adequate records would be maintained by providing for clerical assistance similar to that in Montreal:

Each chamber shall have a clerk selected for that purpose, whose salary will be fixed by us and posted inside the *chambre d'audience*. Each clerk will look after keeping a register for the chamber to which he is attached. It will be numbered from the first page to the last and initialed on each page by one of the captains of the chamber. In the register will be recorded all the judgements of the said chamber, and the Law and Police Ordonnances issued by ourselves.⁴³

1.22. The ordinances which governed the life of the colony were promulgated in French, so that the inhabitants would understand them. In this task the Governors were aided by their French-speaking secretaries. Evidence of the attention given to communication with the inhabitants in their own language may be found in a letter written on January 30, 1762 by Bruyères, the secretary at Trois-Rivières to the local militia captains. In it he forbade the *coureurs des côtes* to traffic in the parishes without written permission from the Governor or his secretary. The letter concluded by saying: "You will take care that if authorizations are given here to go into the parishes, they will be given in French, and that if the said *coureurs des côtes* show you an authorization in English from Mr. Murray or from his secretary and if the said authorization contains a marginal note from me also in English, this marginal note contains a prohibition to traffic and not an authorization."⁴⁴

1.23. On June 21, 1764 the *Quebec Gazette* was published for the first time. This newspaper, the property of Messrs Brown and Gilmore, printers, appeared in both English and French. Apart from news and editorial content, the *Gazette* contained from the beginning ordinances and proclamations in both languages. This newspaper, or rather its successor, still exists as the official organ for the publication of public notices and subordinate legislation in the province of Quebec.

1.24. Finally, the conquerors found practising notaries in the province and apparently recognized the need for them. In fact, they even appointed about a dozen new notaries while maintaining the old ones in their offices.⁴⁵

1.25. Obviously, the continued *de facto* use of French in the administration of justice of the conquered colony was never in question during this period of military rule. The courts of first instance at Trois-Rivières and Montreal were presided over by respected *Canadiens*, speaking the language of the parties. While it is true that the Superior Court and Council at Quebec consisted of British army officers, at least the majority of these knew French, and the principal legal officers at Quebec were two of the most prominent local lawyers of the day. Moreover, the presence of a French-speaking secretary enabled

suitors to draft their proceedings in their mother tongue. The Quebec court, like the courts in Montreal and Trois-Rivières, had French clerks, bailiffs, and officials. Except when both parties to a suit spoke English as their native tongue, proceedings were conducted almost entirely in French.⁴⁶ Moreover, the courts during the military regime applied existing French laws, the records of which had remained in the colony according to the terms of the Articles of Capitulation of Montreal. The jurisprudence of the military regime bears witness to the scrupulous attention given to the language rights of the inhabitants. The military regime, however, ended on August 10, 1764, when Murray published his Commission as Captain-General and Governor-in-Chief of the province of Quebec. In the meantime, although neither the Articles of Capitulation, nor the definitive peace treaty, nor any orders of the colonial administrators gave French any official status, French had in fact received considerable recognition in the administration of justice.

2. Civil government, 1763-74

1.26. During the four years following the conquest and prior to the signing of the definitive peace treaty, the political future of Canada remained uncertain. The British military officers entrusted with the administration of the new colony were unaware of the mother country's intention with regard to the new possession. They served in the main as an occupying force until the royal pleasure as to the fate of Canada should be known. Consequently they were as prudent as possible in the administration of the affairs of the colony and did their best not to antagonize the Canadian population. Instead of overturning the existing system of laws, which they in any case lacked the authority to do, they maintained the status quo. During the four years of the military regime, the militia courts established at Montreal and Trois-Rivières and the military court at Quebec decided cases between the inhabitants according to the laws and ancient customs of the country and not according to English law or equity. This policy of leniency and solicitude was to change when the British acquired definitive control of Canada under the terms of the peace treaty.

1.27. The definitive treaty of peace between Great Britain, France, and Spain was concluded at Paris on February 10, 1763 and was drafted in French. Article 4 provided for the full cession of Canada to Great Britain, recognized the liberty of the Roman Catholic religion among His Majesty's new Canadian subjects as far as the laws of England permitted, and allowed the withdrawal of French colonists desirous of returning to France. Nothing was said about private law or the use of language.⁴⁷

1.28. Once Canada was definitely secured as a British possession by the terms of the Treaty of Paris, the lenient policy of the Board of Trade changed. A plan of consolidation and assimilation was considered and embarked upon. Canada was to become in fact as well as in law a British colony. This intention is evident from the text of a letter dated June 8, 1763, from the Lords of Trade to the Earl of Egremont, one of His Majesty's principal Secretaries of State:

It is obvious that the new Government of Canada, thus bounded, will, according to the Reports of Generals Gage, Murray and Burton, contain within it a very great number of French Inhabitants and Settlements, and that the Number of such

Inhabitants must greatly exceed, for a very long period of time, that of Your Majesty's British and other Subjects who may attempt Settlements, even supposing the utmost Efforts of Industry on their part either in making new Settlements, by clearing of Lands, or purchasing old ones from the ancient Inhabitants. From which Circumstances, it appears to Us that the *Chief Objects* of any new Form of Government to be erected in that Country ought to be *to secure the ancient Inhabitants in all the Titles, Rights, and Privileges granted to them by Treaty, and to increase as much as possible the Number of British and other new Protestant Settlers*, which Objects We apprehend will be best obtain'd by the Appointment of a Governor and Council under Your Majesty's immediate Commission & Instructions.⁴⁸

That this policy of consolidation and assimilation was approved by the King is apparent from a letter of July 14, 1763 from Egremont to the Lords of Trade to that effect.⁴⁹

a) Proclamation of 1763

1.29. The assimilationist policies of the Board of Trade were given legal expression in the Proclamation of King George III of October 7, 1763 which established four colonial governments in North America: Quebec, East Florida, West Florida, and Granada. In all these colonies, an English system of government and laws was to prevail. The Proclamation stated:

We have . . . given express Power and Direction to our Governors of our Said Colonies respectively, that so soon as the state and circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of our Council, summon and call General Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America which are under our immediate Government; and We have also given Power to the said Governors, with the consent of our Said Councils, and the Representatives of the People so to be summoned as aforesaid, to make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and good Government of our said Colonies, and of the People and Inhabitants thereof, *as near as may be agreeable to the Laws of England*, and under such Regulations and Restrictions as are used in other Colonies; and in the mean Time, and until such Assemblies can be called as aforesaid, all Persons Inhabiting in or resorting to our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England; for which Purpose We have given Power under our Great Seal, to the Governors of our said Colonies respectively to erect and constitute, with the Advice of our said Councils respectively, Courts of Judicature and public Justice within our Said Colonies for hearing and determining all Causes, as well Criminal as Civil, *according to Law and Equity, and as near as may be agreeable to the Laws of England*, with Liberty to all Persons who may think themselves aggrieved by the Sentences of such Courts, in all Civil Cases, to appeal, under the usual Limitations and Restrictions, to Us in our Privy Council.⁵⁰

1.30. General James Murray was commissioned as Governor-in-Chief of the province of Quebec on November 21, 1763. By the terms of his Commission, Murray was empowered to call an assembly of the freeholders. However, because the commission required the members of such an assembly to make and sign a declaration against popery, as enjoined by the so-called Test Act,⁵¹ the Canadians, being Roman Catholics, were effec-

tively barred from participation in the legislature.⁵² The same oath requirement also excluded them from participation in the courts of judicature and Executive Council which Murray was also authorized to establish.⁵³ Article 16 of Murray's instructions empowered him to establish a system of judicature similar to that of the other English colonies in America. This foreshadowed the disbandment of the system of militia courts which had found no disfavour among the Canadians. A deliberate policy of religious assimilation found expression in article 33 of the instructions:

And to the End that the Church of England may be established both in Principles and Practice, and that the said Inhabitants may by Degrees be induced to embrace the Protestant Religion, and their Children be brought up in the Principles of it; We do hereby declare it to be Our Intention, when the said Province shall have been accurately surveyed, and divided into Townships, Districts, Precincts or Parishes, in such manner as shall be hereinafter directed, all possible Encouragement shall be given to the erecting Protestant Schools in the said Districts, Townships and Precincts, by settling, appointing and allotting proper Quantities of Land for that Purpose, and also for a Glebe and Maintenance for a Protestant Minister and School-Masters; and you are to consider and report to Us, by Our Commissioners for Trade and Plantations, by what other Means the Protestant Religion may be promoted, established and encouraged in Our Province under your Government.⁵⁴

1.31. Since Murray did not receive nor publish his commission until August 4, 1764, it is probable that, although he was aware for a long time of the cession of Canada to England, he did not feel authorized to change anything in the administration of the country before receiving instructions from the King and publishing his commission. On August 4, 1764, the civil and criminal court sat for the last time in Montreal. The militia courts continued to sit until August 10, 1764. The civil courts which replaced them were not established until September 17 of the same year, by the ordinance of that date.⁵⁵

b) Ordinance of September 17, 1764: new system of judicature

1.32. The full title of this ordinance was An Ordinance for regulating and establishing the Courts of Judicature, Justices of the Peace, Quarter-Sessions, Bailiffs, and other Matters, relative to the Distribution of Justice in this Province. Governor Murray and his Council accordingly established a system of civil and criminal judicature to replace the disbanded militia courts. The ordinance provided for three levels of courts.

First, it set up a superior court of judicature, or Court of King's Bench, sitting at Quebec, and having power to hear and determine all criminal and civil cases in accordance with the laws of England and with the ordinances of the provinces.

Secondly, it created an inferior court of judicature, or Court of Common Pleas with power and authority to determine all civil suits involving a value of £10 or more, with a right of appeal to the King's Bench when the matter in dispute was £20 or more. It is evident that this court was established primarily for the benefit of the Canadians, for its judges were to determine according to equity, merely having regard to the laws of England as far as circumstances and the present situation would admit, "until such Time as proper Ordinances for the Information of the People can be established by the Governor and Council, agreeable to the laws of *England*." Moreover, French laws and customs were

to be allowed and admitted in all cases before this Court "between the Natives of this Province, where the Cause of Action arose before the first day of *October*," 1764.⁵⁶

Thirdly, provision was made for the appointment of justices of the peace in each district. Again, the requirement of an anti-popery declaration prevented Canadians from filling such positions.

Nevertheless, participation in the administration of justice was not the exclusive prerogative of the newly arrived English-speaking citizens of the province. Some concessions were made to French Canadians. In the Court of Common Pleas the proceedings were drawn up in any form and style that the parties or their lawyers thought fit, sometimes in French and sometimes in English, depending on the language of the lawyer who prepared them. They were most often in the French language, since most of the business in the Courts of Common Pleas was carried on by Canadian advocates. Even in the Court of King's Bench while all proceedings—the forms of actions, the style of pleading, the method of trial, and the rules of evidence—were carried on as prescribed by English law, the ordinance provided that in "all Tryals in this Court, all His Majesty's Subjects in this Colony to be admitted on Juries without Distinction."⁵⁷

The effect of this provision was, of course, to allow French-speaking Canadian Roman Catholics to sit on juries in the Court of King's Bench. According to the laws of England then in force, only Protestants were permitted so to serve. This innovation marked a departure from the Board of Trade's policy of anglicization. Murray therefore felt that an elucidation was required. Accompanying the copy of this ordinance, which was forwarded to the home government, were explanatory notes, in which Murray stated his reasons for introducing various measures. On the above-quoted provision his observation was as follows:

As there are but Two Hundred Protestant Subjects in the Province, the greatest part of which are disbanded Soldiers of little Property and mean Capacity, it is thought unjust to exclude the new Roman Catholic Subjects to sit upon Juries, as such exclusion would constitute the said Two hundred Protestants perpetual Judges of the Lives and Property of not only Eighty Thousand of the new Subjects, but likewise of all the Military in the Province; besides if the Canadians are not to be admitted on Juries, many will Emigrate; This Establishment is therefore no more than a temporary Expedient to keep Things as they are until His Majesty's Pleasure is known on this critical and difficult Point.⁵⁸

Another exception favouring the French Canadians was the provision allowing Canadian advocates to practise in the Court of Common Pleas. According to the Test Act then enforced in England, Roman Catholics were barred from membership in the legal profession. Governor Murray's observation on this provision of the ordinance was as follows: "We thought it reasonable and necessary to allow Canadian Advocates and Proctors to practice in this Court of Common Pleas only (for they are not admitted in the other Courts) because we have not yet got one English Barrister or Attorney who understands the French Language."⁵⁹ G.E. Buchanan, in his *The Bench and Bar of Lower Canada*, gives a list of the first lawyers to be admitted to the Bar of Quebec: out of 40 names cited, 16 are French.⁶⁰

Finally, the ordinance of September 17, 1764 provided for the election of bailiffs in every district in the following words:

*It is therefore Ordered . . . That the Majority of the Householders, in each and every Parish, do, on the Twenty-Fourth Day of June, in every Year, elect and return to the Deputy-Secretary, within fourteen Days after such Election, six good and sufficient Men to serve as Bailiffs and Sub-Bailiffs in each Parish, out of which Number the King's Governor, or Commander in Chief for the Time being, with the Consent of the Council, is to nominate and appoint the Persons who are to act as Bailiffs and Sub-Bailiffs in each Parish; . . .*⁶¹

Canadians were thus enabled to serve as bailiffs and sub-bailiffs even though they were prevented from serving on the bench.

The purpose of the ordinance of September 17 was to introduce the laws of England into Canada and to establish a system of judicature as similar as possible to that prevailing in England. The exceptions to this intention only served to emphasize it. For instance, the Court of Common Pleas was established primarily for the Canadians. However, it is evident from Murray's dispatch to the home government that it was only a temporary expedient. The Governor offered the following justification for it:

Not to admit of such a Court *until* they can be supposed to know something of our Laws and Methods of procuring Justice in our Courts, would be like sending a ship to sea without a Compass; indeed it would be more cruel — the ship might escape. Chance might drive her into some hospitable Harbour, but the poor Canadians could never shun the Attempts of designing Men, and the Voracity of hungry Practitioners in the Law; they must be undone during the First Months of their Ignorance; if any escaped their Affections must be alienated and disgusted with our Government and Laws. . . .

It is necessary to Observe that the few British Traders living here, of which not above Ten or Twelve have any fixed Property in this Province, are much dissatisfied because we have admitted the Canadians on Juries; the Reason is evident, their own Consequence is thereby bounded. But the Practitioners in the English Law have probably put them out of Humour with the Court of Common Pleas (which they are pleased to call unconstitutional).⁶²

1.33. On October 3, 1764, Murray and his Council passed an Ordinance, Declaring what shall be deemed a due Publication of the Ordinances of the Province of Quebec. The ordinance provided:

That *the publick Reading* of any Ordinance of this Province, by the Provost-Marshal or his Deputy, in the three principal Towns of the said Province, to wit: Quebec, Montreal and Trois-Rivières, after Notice by Beat of Drum, and the publishing the same in the Quebec-Gazette, *shall be deemed a sufficient Publication* thereof.

And all Ordinances heretofore, or which hereafter may be published in that Manner, are hereby Declared to be in Force accordingly, from the Time of such Publication.⁶³

1.34. By October 13, 1764, Chief Justice Gregory and Attorney General Suckling had prepared all the new forms which were to be employed either before the courts or in ordinary transactions before notaries. These forms have survived and they indicate that it was definitively intended to establish a procedure in the colony which followed that in England.⁶⁴ Furthermore, the explanations given by Murray for the adoption of certain exceptional measures such as the eligibility of all inhabitants without distinction to sit on juries in the Court of King's Bench and the permitting of Canadian lawyers to practise in

the Court of Common Pleas, the wording of the Ordinance of September 17, and a subsequent ordinance, all indicate that whatever deference was given to French laws and language was intended to be merely temporary. These measures were meant to alleviate any hardships to the Canadians which might arise during the transitional period between the complete abolition of the former Canadian law and its replacement by English law, thereby facilitating the adaptation of the population to the new regime.

The policy of clearing away the loose ends of the former regime of laws to make way for the new was confirmed by two subsequent ordinances. On September 20, 1764 the Governor in Council issued an Ordinance For ratifying and confirming the Decrees of the several Courts of Justice established in the Districts of Quebec, Montreal and Trois-Rivières, prior to the Establishment of Civil Government throughout this Province, upon the tenth Day of August, One Thousand Seven Hundred and Sixty-four.

The ordinance ratified and confirmed all decisions rendered by courts of justice in Montreal, Quebec, and Trois-Rivières from September 8, 1760 (date of the capitulation of Montreal), to August 10, 1764, subject to a right of appeal within two months to the Governor and Council if the sum in dispute exceeded £300, and from the Governor and Council to the King and Council if the sum in controversy was £500 or more.⁶⁵

The second ordinance, passed on November 6, 1764, was entitled an Ordinance to quiet the Spirits of the People with regard to the Possession of their Property. It provided that questions of real property in general and of successions should remain subject to the custom of the country until August 10, 1765.⁶⁶ From the foregoing it is reasonable to conclude that the colonial administration wished to introduce the whole of English law into the province of Quebec, despite any temporary concessions that may have been made to the French Canadians.

1.35. It is not clear whether the notarial profession was abolished during this period. What is known, however, is that it continued *de facto*. Its existence was endangered by the abolition of French law and by the requirements of the Test Act. At the beginning the authorities tolerated the notaries but eventually they recognized them officially by themselves commissioning new notaries.⁶⁷

1.36. Surprisingly it was not the *Canadiens* who reacted most vociferously to the regime introduced by the Proclamation of 1763 and the Ordinance of September 17, 1764. Rather it was the new English merchant class, who were a very small minority in comparison to the native population. They strongly objected to those few concessions which had been made to the Canadians in order to allow them to adjust to the new system of judicature, and they favoured an uncompromising policy of anglicization. General Murray remarked of their reaction that:

It is necessary to Observe that the few British Traders living here, of which not above Ten or Twelve have any fixed Property in this Province, are much dissatisfied because we have admitted the Canadians on Juries; the Reason is evident, their own Consequence is thereby bounded. But the Practitioners in the English Law have probably put them out of Humour with the Court of Common Pleas (which they are pleased to call unconstitutional).⁶⁸

The discontent of the English-speaking element took the form of an organized formal protest, expressed in the "Presentments of the Protestant Grand Jurors of Quebec," made

on October 16, 1764.⁶⁹ In article 9 of these presentments the signatories purported to be the only representative body of the colony and to have a right to be consulted about any ordinance before it was made law, and in article 12 they claimed that the Ordinance of September 17 might be in part unconstitutional.⁷⁰

In the same document the Protestant grand jurors also made a lengthy objection to the admission of Canadian lawyers and jurors to the courts of the province. They argued that Roman Catholics owed their prime allegiance to the Pope and that it was contrary to the laws of England for them to serve on juries, particularly as they were also disabled from serving in any official position.⁷¹

In a later undated document, probably drafted sometime after the former presentments (since it obviously replies to criticisms directed at them), the grand jurors qualified their objection to the admission of Canadians to King's Bench juries. We quote the text in its entirety for the opinions expressed in it foreshadow the demand for introduction into the province of Quebec of the jury *de medietate linguae* or mixed jury, an institution which has survived to the present day:

As the presentment made by the protestant members of the Jury, wherein the impannelling of Roman Catholicks upon Grand petty Juries, even where two protestants are the parties, is complained of. As this very presentment has been openly & ungenerously used as a handle to set his Majesty's old & new Subjects at variance in this province, we cannot help endeavour to set the public right in this particular in which they have been so grossly imposed on: What gave birth to this presentmt. was the following short, but pithy Paragraph, in the Ordinance of the 17th Day of Sept^r last.

"In all Tryalls in this Court all his Majesty's Subjects in this Colony to be admitted on Juries without any distinction": This is qualifying the whole province at once for an Office which the best & most sensible people in it are hardly able to discharge: It then occur'd to the Jury that was laying a Subjects life, liberty & property too open, & that both old & new Subjects might be apprehensive of the consequence from the unlimited admission of Jurymen His Majesty's lately acquired Subjects cannot take it amiss, that his ancient subjects remonstrate agt this practice as being contrary to the laws of the realm of England, the benefit of which they think have a right to, nor ought it to give offence when they demand that a protestant Jury should be impannelled when the litigating parties are protestants such were the real motives of the Presentment, and we can aver that nothing further was meant by the quotation from the Statute.

That the subscribers of the presentment meant to remove every Roman Catholic from holding any office or filling any public employment is to all intents and purposes a most vile groundless insinuation & utterly inconsistent: Sentiments & intentions such as these we abhor, & are only sorry that principles do not allow us to admit Roman Catholicks as Jurors upon a cause betwixt two protestants; perhaps theirs hold us in the same light in a Case betwixt two Catholicks, and we are very far from finding fault with them, the same liberty that we take of thinking for ourselves we must freely indulge to others.⁷²

It is evident from the foregoing document that the grand jurors objected to the participation of Roman Catholic jurors in trials between Protestants and they conjectured that the Catholic inhabitants might have the same objections to the participation of Protestant jurors in cases between themselves. These objections manifestly founded on religious considerations were quite probably based on linguistic grounds as well, for apart from

whatever feelings of prejudice and intolerance they may have harboured, the grand jurors most certainly would have wished to avoid the disadvantages attendant upon a jury's incomprehension of court proceedings.

c) Statement of linguistic and minority rights

1.37. The vigorous reply of the French-speaking grand jurors of Quebec to the presentments of their English-speaking colleagues is a noteworthy event in the legal history of bilingualism in Canada. This statement was made on October 26, 1764, and is an eloquent manifesto of linguistic and religious minority rights which are part of the very fabric of contemporary bilingualism and biculturalism. Of particular interest are the defence of the creation of the Court of Common Pleas as a tribunal in which French Canadians could express themselves in their own language, the assertion of the rights of French Canadians to participate in the administration of justice either as lawyers or as jurors in their own language, and the assertion of the right of those entrusted with the business of the government to be informed in their own language of those subjects on which they must pass opinion. They stressed the need for representation by lawyers who could understand them and speak their language, and they expressed their rejection of the view proffered by the Protestant grand jurors that the King's new subjects, though fit to take the oath of allegiance and help defend the colony, could not serve as jurors.⁷³

The claims of the French-speaking grand jurors were supplemented and reinforced by an address to King George III signed by 95 of the principal French-speaking inhabitants of Canada. The original document was sent to the King and was read on January 2, 1765. This address complained about the introduction of English law into the colony. It expressed satisfaction with the administration of justice during the four years of the military regime and fears that the system to which French Canadians had grown accustomed would be swept away by a system of laws drafted and administered in an unknown language. The addressants complained about the inexpertness and greed of the English attorneys who were ignorant of their language and customs, and referred to the expense, confusion, and injustice which would result from their being judged solely by English-speaking magistrates through the medium of an interpreter. They claimed repeatedly that the whole problem resulted from the desire of a tiny minority of merchants to impose its will on a large local population. They concluded their address with a threefold entreaty to the King to confirm the system of judicature which had been established for the benefit of the French by the Ordinance of September 17, 1764, to allow Canadian notaries and advocates to continue to practise, and to permit Canadians to transact family affairs in their own language and to follow their own customs. Finally they asked the King to ensure that laws of the colony be promulgated in the French language.⁷⁴

1.38. A perusal of private documents and court records of the period indicate that *de facto* the Canadians, especially in those fields which required the rule of English law, continued to follow a form of self-made justice. Family matters, such as dower and succession, were decided by resorting to Canadian notaries and lawyers instead of to the new tribunals. From a study of the court records for the 10 years preceding the Quebec Act one may reasonably conclude that relative to their numbers the Canadians used the

courts established by the Ordinance of September 17, 1764 very infrequently, and that resort was had to these tribunals primarily on occasions when pre-session Law could be followed. Professor André Morel has referred to this reaction of the Canadians during the civil regime as a form of passive resistance.⁷⁵

1.39. The reaction of the two national groups to the introduction of the new regime set the stage for 10 years of sharp debate as to whether the laws of France had been entirely replaced by laws of England as a result of the Proclamation of October 7, 1763 and the Ordinance of September 17, 1764. Much ink was spilled by the colonial officials and advisers of the period in an attempt to settle the question. Admittedly, during this entire decade there never was an express official policy to abolish the use of the French language. However, it may be argued that, as a result of the permanent introduction of English law relative to civil rights, the language rights of the native population would have been abrogated in so far as these laws were written in English. Furthermore, the introduction of English law may have carried with it the application of an Act of 1731,⁷⁶ whereby English had been made the only permissible language of pleading and record in the courts of England. The various anti-Catholic laws of England, particularly those requiring of public officials and members of the professions the oaths against popery and transubstantiation, were also transported to Canada. This was the ground for the contention by the English elements that the recognition of Canadian jurors and lawyers by Murray was unconstitutional. In the following sections we shall follow the debate and attempt to draw some conclusions as to the legal status of bilingualism during the period of the civil regime.

1.40. On October 29, 1764, Governor Murray wrote to the Board of Trade to justify on political rather than legal grounds his refusal to enforce strictly the terms of the Proclamation of October 7, 1763. He described the English merchants trading in Quebec as "licentious fanaticks" whose manoeuvres threatened the future of the new colony. He added: "I am confident too my Royal Master will not blame the unanimous opinion of his Council here for the Ordonnance establishing the Courts of Justice, as nothing less cou'd be done to prevent great numbers from emigrating directly, and certain I am, unless the Canadians are admitted on Jurys, and are allowed Judges and Lawyers who understand their Language his Majesty will lose the greatest part of this Valuable people."⁷⁷

1.41. An influential group of Quebec merchants reacted vehemently to Murray's conciliatory policy and petitioned the King for his removal. One of their grievances against Murray was his encouragement of French-speaking judges.⁷⁸ These complaints were enthusiastically endorsed by a band of English merchants in London in a petition presented to the King and annexed to the one from Quebec.⁷⁹

1.42. Meanwhile, however, in a memorandum to the Board of Trade, Attorney General Fletcher Norton and Solicitor General William De Gray opined that the anti-papist laws of England had not been extended to the province of Quebec by the 1763 proclamation.⁸⁰ The effect of this opinion would of course have been to sanction the concessions made to the Canadians in the Ordinance of September 17, 1764.

1.43. The Board of Trade, pursuant to an Order-in-Council ordering it so to do, prepared a lengthy report to the Committee for Plantation Affairs on the various presentments and petitions made by the inhabitants of Quebec.⁸¹ While not dealing directly

with the claim that the concessions made to Canadians with regard to the administration of justice were unconstitutional, the authors of the report expressed the opinion that the rights of French Canadians in this respect should be expanded, even going so far as to criticize the exclusion of French lawyers and French laws from the Court of King's Bench. They also subjected the Ordinance of September 17, 1764 to the major criticism: that it was unwise to attempt to abolish French civil law and to exclude French Canadians from official positions on the ground of their religion.⁸² The report was in some sympathy with the complaints of the English merchants in connection with the provision for all-Canadian juries in disputes between British-born subjects and Canadians and offered the opinion that "an equal number of each should have been impanelled upon the Jury, if required by either Party."⁸³ In this statement we can find the genesis of the right to a mixed jury which still survives in Quebec law.

While the authors of the report did not go so far as to recommend the reintroduction of French law in the province, it is evident that they believed that the rights of the Canadian inhabitants in the administration of justice should be expanded. They further recommended that Canadians be permitted to practise as lawyers in all courts and that all magistrates should be required to understand French.⁸⁴ The report concluded by describing the manoeuvres of the English grand jurors as "indecent, unprecedented and unconstitutional" and by recommending that a new ordinance of judicature be drafted in England and transmitted to the Governor of Quebec to replace the Ordinance of September 17, 1764.⁸⁵

1.44. In a letter dated September 2, 1765 and addressed to the King, the Board of Trade recommended that Governor Murray be recalled to London in order to account personally for the state of affairs in the colony and recommended that a General Assembly, consisting of the Governor, the Council, and a House of Representatives be called. The letter noted that the House of Representatives had not yet been assembled and suggested that the province be divided into three electoral districts (Quebec, Montreal, and Trois-Rivières). Roman Catholics should be entitled to vote: "We apprehend there would be found a sufficient number of Persons in each County qualified to serve as Representatives, and in the Choice of whom all the Inhabitants of such County might join; seeing that we know of no Law by which Roman Catholicks, as such, are disqualified from being Electors."⁸⁶

However, there appears to be a contradiction in this recommendation since the granting of the vote to Roman Catholics did not by itself overcome the prohibition contained in the terms of the Commission to Governor Murray against participation of Roman Catholics in the membership of the Legislative Assembly.

1.45. As a result of this report additional instructions were sent to Governor Murray on February 17, 1766. They provided for the elimination of all impediments to the participation of French Canadians in the administration of justice, and set out a detailed scheme for mixed juries.⁸⁷

d) Ordinance of July 1, 1766

1.46. On July 1, 1766 Governor Irving, who had replaced Murray during the latter's recall to London, issued a new ordinance of judicature recognizing the right of Canadians

to be empanelled as jurors in all civil and criminal cases; providing for juries composed of persons speaking the same language as the parties (or for mixed juries if the parties spoke different languages); and opening the legal profession fully to the inhabitants.⁸⁸

1.47. On April 14, 1766, Attorney General Yorke and Solicitor General De Gray wrote to the Board of Trade about the state of affairs in Quebec and asserted that two principal sources of disorder in the province were the attempt to exclude French Canadians and their language from the administration of justice, and the erroneous interpretation of the 1763 royal proclamation as completely abolishing French law.⁸⁹ The writers pointed out that the additional instructions of February 17, 1766 had remedied the first cause of disorder. As to the second, they expressed the opinion that the Proclamation of October 17, 1763 and the Ordinance of September 17, 1764, had not effected the wholesale introduction of English law to the new colony:

There is not a *Maxim* of the *Common Law* more certain than that a Conquer'd people retain their antient Customs till the Conqueror shall declare New Laws. To change at once the Laws and manners of a settled Country must be attended with hardship and Violence; and therefore wise Conquerors having provided for the security of their Dominion, proceed gently and indulge their Conquer'd subjects in all local Customs which are in their own nature indifferent, and which have been received as rules of property or have obtained the force of Laws. It is the more material that this policy be persued in *Canada*; because it is a great and antient Colony long settled and much Cultivated by French Subjects, who now inhabit it to the number of Eighty or one hundred thousand.⁹⁰

They recommended that French private law be re-established but that English criminal law be retained.⁹¹

1.48. Early in March 1766 (though his commission as issued at Quebec under the authority of Governor Carleton is dated only September 25, 1766) Baron Francis Maseres, an English barrister of Swiss origin, was appointed Attorney General for the province of Quebec. Before he left for Canada, he wrote and published certain "Considerations" which comprised a lengthy and closely reasoned exposition of the state of laws in the province of Quebec.⁹²

In the opinion of Maseres, and contrary to that of Norton and De Gray, the anti-papist laws of England indeed had been extended to Canada by the Proclamation of 1763. Article 4 of the Treaty of Paris of 1763 had granted the freedom of the Roman Catholic religion to Canadian subjects "as far as the laws of Great Britain permit." However, this was only a false concession since "... no degree of toleration is already actually allowed by the laws of Great Britain in any part of the British dominions."⁹³ As a result of the extension of the anti-Catholic laws to Canada, Maseres concluded that Canadians were excluded (in law at least) from any participation in the administration of justice. He recommended that the Roman Catholic religion receive unequivocal official toleration, but added that only an act of Parliament, and not royal sanction, would suffice towards that end.⁹⁴

As for the extent of the introduction of English law to the province of Quebec, Maseres concurred in the opinion of Yorke and De Gray that it was doubtful that English law had been introduced wholesale. Only an act of Parliament could resolve the uncer-

tainty: "It may therefore be concluded, as at first, that none of the laws of England are valid in the conquered province *ipso facto* by virtue of the conquest, or cession, without a positive introduction there by a sufficient authority; and this sufficient authority seems, for the reasons already mentioned, to be only the Parliament of Great Britain."⁹⁵

Finally, Maseres objected for the time being to the convocation of a legislative assembly. He offered two grounds for this objection. First he contended that the Test Act had been extended to Canada by the terms of Proclamation of 1763 and that this would have barred Canadian participation in such an assembly. The result would have been to convoke an assembly for which only several hundred out of a population of 80,000 or more were eligible for membership. Secondly, even assuming that Canadians could legally be admitted to such an assembly, Maseres nevertheless felt that such a measure should be avoided as endangering the policy of rapid anglicization:

On the other hand, it might be dangerous in these early days of their submission, to admit the Canadians themselves to so great a degree of power. Bigotted, as they are, to the Popish religion, unacquainted with, and hitherto prejudiced against the laws and customs of England, they would be very unlikely for some years to come, to promote such measures, as should gradually introduce the Protestant religion, the use of the English language, of the spirit of the British laws. It is more probable they would check all such endeavours, and quarrel with the governor and council, or with the English members of the assembly, for promoting them. Add to this, that they are almost universally ignorant of the English language, so as to be absolutely incapable of debating in it, and consequently must, if such an assembly were erected, carry on the business of it in the French language, which would tend to perpetuate that language, and with it their prejudices and affections to their former masters, and postpone to a very distant time, perhaps for ever, that coalition of the two nations, or the melting down the French nation into the English in point of language, affections, religion, and laws, which is so much to be wished for, and which otherwise a generation or two may perhaps effect, if proper measures are taken for that purpose.⁹⁶

Maseres concluded his report by saying that if an assembly were to be established to which Roman Catholics or Canadians were to be admitted "as in justice and reason" they had to be, an act of the United Kingdom Parliament would be necessary to give validity to such a measure.⁹⁷

1.49. In a letter to the Board of Trade dated August 20, 1766, acting Governor Aemilius Irving described the ameliorative effect of the additional royal instruction and of the Ordinance of July 1, 1766, as follows:

My Lords,

As the Courts of Justice are now sitting, I have an opportunity to observe the good Effects of the Additional Instruction, which, by assuring to the Canadians the Privilege of being Jurors, and of having Lawyers that can speak their own Language, has contributed very much to quiet their minds, not a little alarmed by the long Delay which the matters that Captain Cramahé was charged with, met with in London. All that to me seems wanting at present, is a permanency to the inferior Court, and an Augmentation of the Terms of its sitting. The Slowness of the Proceedings of the Superior Court, has rendered the inferior one of great Utility to the Publick, and the small Fees taken in it, have prevented the people from becoming the Prey of attornies. The Chief Difficulty that has occurred is what happens in

appeals from it to the Superior Court; as the Proceedings are threatened to be reversed on Account of deviation from the English Form, without entering into the merits of the Cause, or the Reasons upon which the judgment was founded: The Canadian Advocates must have been inspired to have been able in so short a time to comply with Forms to which they were all Strangers, especially as the Ordinance directing the Nature of Proceedings in that Court has never been published, on Account of the uncertainty the Council was in, whether His Majesty would approve of what had already been done in these Matters or not.⁹⁸

1.50. On February 3, 1767, the seigneurs of Montreal petitioned King George III for removal of the impediments to Canadian participation in the judiciary:

that all the subjects of this province without any Distinction of Religion may be admitted to any Office, the only basis of selection being that of capacity and personal merit. To be excluded by the State from participating in it, is not to be a member of the state. If they feel such a humiliation, they would appreciate all the more the value of such a distinguished favour for which they can only offer their hearts full of love and gratitude. Their Zeal their affection and their devotion shall be the signal proofs of it for all time to come.⁹⁹

Of course, the seigneurs had exercised substantial local authority under the French regime and during the four years of British military rule after the conquest they had actually administered justice in Montreal and Trois-Rivières.

1.51. A royal mandate, dated February 3, 1766, commanded the Governor of Quebec to commission William Hey as Chief Justice of the province.¹⁰⁰ The commission, which was issued and registered at Quebec on September 25, 1766, empowered Hey to determine all civil suits and actions "according to the Laws and Customs of that part of our Kingdom of Great Britain Called England, and the Laws, Ordinances, Rules, and Regulations of our said province of Quebec, hereafter in that behalf to be Ordained and made."¹⁰¹ It is thus apparent that at this stage at least the imperial authority had no intention of restoring French private law.

1.52. Finally, however, the complaints of the Canadians began to make an impression on officials in England. On April 30, 1767, the *Quebec Gazette* published the following editorial, entitled "Reflexions on the Affairs of the Times, relative to the Administration of Justice," which expressed hopes for the restoration of French laws:

It is publicly said, that our Sovereign Lord King George III, having been pleased to favour his new Subjects in Canada, who are all French, and whom his Predecessor hath gloriously conquered, understands, that they shall be judged according to the French Laws which were heretofore in Use in this Country [which Method was practised in Normandy, a conquered Country] and that French Judges, Men *versed in the Laws*, shall be established, in Order to administer Justice among the French Inhabitants, by Orders from His Majesty, and from his Representatives in this Colony, according to a Code (or Body of Laws) which his Excellency the Governor of Canada will be pleased to get reduced into Form and printed. This will contribute to the Welfare of the whole Colony; when there will be weekly Sitzings, and when every French Individual will be judged according to the French Laws, and according to the Practice and Customs of this Country: There will then be less Delay, less Chicanry, and less Costs, which will be a most essential Matter in the present Circumstances. What is there that we may not expect from the Wisdom and

Prudence of the Government, as the Matter in Agitation is the Interest of the Publick.

In fact, on August 28, 1767, the Privy Council passed an order which, following the advice of the Board of Trade, ordered the Governor of Quebec to submit a report to the King on the following two subjects: (1) whether any and which defects then existed in the judicature of the province of Quebec; (2) whether the Canadians in particular were or considered themselves to be aggrieved by the existing administration of justice. Any proposed additions or amendments were to be submitted to the King in the form of a draft ordinance.¹⁰²

On November 25, 1767 the acting Governor Sir Guy Carleton dispatched a letter to the Earl of Shelburne, one of the King's principal Secretaries of State, commenting on the natural increase of the Canadians and expressing doubts that an English-speaking element could ever achieve a numerical superiority in the province of Quebec.

Having arrayed the Strength of His Majesty's old and new Subjects, and shewn the great Superiority of the Latter, it may not be amiss to observe, that there is not the least Probability, this present Superiority should ever diminish, on the Contrary 'tis more than probable it will increase and strengthen daily: The Europeans, who migrate never will prefer the long unhospitable Winters of Canada, to the more cheerful Climates, and more fruitful Soil of His Majesty's Southern Provinces; The few old Subjects at present in this Province, have been mostly left here by Accident, and are either disbanded Officers, Soldiers, or Followers of the Army, who, not knowing how to dispose of themselves elsewhere, settled where they were left at the Reduction; or else they are Adventurers in Trade, or such as could not remain at Home, who set out to mend their Fortunes, at the opening of this new Channel for Commerce, but Experience has taught almost all of them, that this Trade requires a Strict Frugality, they are Strangers to, or to which they will not submit; so that some, from more advantageous Views elsewhere, others from Necessity, have already left this Province, and I greatly fear many more, for the same Reasons, will follow their Example in a few Years; But while this severe Climate, and the Poverty of the Country discourages all but the Natives, it's Healthfulness is such, that these multiply daily, so that, barring Catastrophe shocking to think of, this Country must, to the end of Time, be peopled by the Canadian Race, who already have taken such firm Root, and got to so great a Height, that any new Stock transplanted will be totally hid, and imperceptible amongst them, except in the Towns of Quebec and Montreal.¹⁰³

This letter constitutes one of the first cracks in the optimistic assimilationist policy inaugurated by the Proclamation of October 1763. Till then, all concessions made to the Canadians which seemed to depart from this policy were spoken of, even by the most favourable officials, as merely temporary measures to be scrapped as soon as possible.

1.53. The Earl of Shelburne had been entrusted with the execution of the Privy Council's order of August 28, 1767. On December 17 of the same year he wrote to Carleton informing him of the royal command that he make a full inquiry into the state of judicature in the province and submit a report thereon.¹⁰⁴ On Christmas Eve of the same year, before he could have received Shelburne's letter, Carleton wrote to him criticizing the indiscriminate introduction of English law as unprecedented and a source of injustice and discontent. Carleton also criticized the costs and confusion resulting from

the state of judicature in Quebec. He pointed out that among Canadians, most transactions continued to be carried out according to French law. To remedy the situation, he recommended the restoration of most French private law.¹⁰⁵

1.54. In the beginning of the year 1768 François Joseph Cugnet was named French Secretary of the Governor and Council at Quebec. His duties were to translate into French the laws, orders, and regulations of the Governor-in-Council under the direction of the latter and to serve as a consultant on the pre-1760 law by retrieving and examining the ancient edicts and decisions of the superior council and of the other courts under the old regime. Cugnet was an accomplished legal scholar and fluent in the English language. For a quarter of a century he translated the governor's ordinances into French.¹⁰⁶

1.55. On January 20, 1768, Carleton reiterated in a letter to the Earl of Shelburne the advisability of restoring French civil law:

... it therefore seems to me highly expedient, that, at least, those Causes of Complaint, which affect the Bulk of the People, and come home almost to every Man, should be removed; That they should be maintained in the quiet Possession of their Property, according to their own Customs, which Time immemorial, has been regarded by them and their Ancestors, as Law and Equity; and that the Approach to Justice and Government, for the Redress of Wrongs, be practicable and Convenient, in Place of being ruinous by Delay, and an Expence disproportioned to their Poverty; but this is neither in the Power of Justice or Government here to grant him, while the Supreme Court is obliged to Judge according to the Laws of England, and the different Offices can claim, as their Right, Fees calculated for much wealthier Provinces.¹⁰⁷

1.56. On March 6, 1768, the Earl of Hillsborough, First Secretary of State for the Colonies, who had had a part in the drafting of the Proclamation of October 1763, wrote to Carleton and protested that it had never been the intention of the proclamation to overturn the entire system of French private law and that its sole purpose was to introduce the English law of procedure. Hillsborough asserted that the intention of the proclamation had been subverted by the incompetence of colonial administrators entrusted with its execution.¹⁰⁸ Whatever the intention of its draftsmen, it is impossible to read the proclamation without receiving the impression that the unqualified intention of the home government had been to introduce English law in its entirety to the colony.

1.57. On April 12, 1768 Carleton wrote again to Shelburne, once more recommending the retention of French property law on the grounds of *real politik*:

The Canadian Tenures differ, it is true, from those in the other Parts of His Majesty's American Dominions, but if confirmed, and I cannot see how it well can be avoided, without entirely oversetting the Properties of the People, will ever secure a proper Subordination from this Province to Great Britain; if its detached Situation be Constantly Remembered, and that on the Canadian Stock we can only depend for an Increase of Population therein, the Policy of Continuing to them their Customs and Usages will be sufficiently Evinced.¹⁰⁹

In the same letter, Carleton referred to the compilation he had ordered of laws in force at the time of the conquest. The compilation not being ready, he enclosed with his letter an interim summary of these laws.¹¹⁰

On November 20, 1768, in a confidential letter to the Earl of Hillsborough, Carleton again warned of the danger of continuing to exclude from public office the principal Canadian citizens.¹¹¹

1.58. On September 12, 1769 there was delivered to Morris Morgan, a special emissary of the Earl of Hillsborough, a draft of the report on the state of the laws and of the administration of justice in Quebec required by the Order-in-Council of August 28, 1767. This report had been prepared by Attorney General Maseres. Governor Carleton refused to sign it and wrote a report of his own (which will be discussed in the next section), which was delivered at the same time. Maseres' draft is a long and comprehensive document, dealing with many points.¹¹² We shall summarize the relevant conclusions.

1. *Religion.* The report argued that the anti-papist laws of England had been extended to Quebec as a result of the cession and that the Roman Catholic Church could not have any legal status in Canada more particularly because of an Act of 1558, which forbade the extension of the spiritual or temporal jurisdiction of any foreign prince or prelate to any British dominion.¹¹³

2. *Introduction of English law.* The report concluded that the combined effect of the 1763 proclamation, of Murray's Commission and Instructions, and of the Ordinance of September 17, 1764, was to introduce English law in its entirety. The report recognized that the French Canadians were perhaps ignorant of the extent of the change which had taken place in the laws governing them and that they had continued to follow their own laws and usages, at least in areas such as inheritances.¹¹⁴ It pointed out that where criminal law was concerned, even the French Canadian *habitants* agreed that English law now applied.¹¹⁵ Furthermore, except in the Court of Common Pleas, English procedures seemed to be used:

And in all civil proceedings carried on in the superiour court, or court of King's Bench, the forms of all actions, the stile of the pleadings used in them, the method of trial, and the rules of evidence are those which are prescribed by the English law, and are universally known by the Canadians to be so.

In the court of Common Pleas the proceedings are drawn up in any form and stile that the parties, or their advocates, think proper, and sometimes in the French and sometimes in the English language, as the attornies who prepare them happen to be Canadians or Englishmen; and for this reason they are oftenest in the French language, most of the business in this court being managed by Canadian attornies.¹¹⁶

While the report had no hesitation in saying that the Proclamation of October 7, 1763, had introduced the entire body of English law into Quebec, it allowed that British policy might require a less restrictive interpretation. Furthermore, Murray's Ordinances of September 17 and November 6, 1764, could not by themselves be interpreted as introducing English law since they exceeded the limited legislative authority granted to him under his commission. No support for the validity of these ordinances could be derived from the private instructions given to the Governor since, in Maseres' opinion, the only valid way to communicate such legislative power was by means of letters patent under the King's Great Seal, publicly read and proclaimed to the people so that the acts done by virtue of them could have a just claim to their obedience. Even if such private grant of legislative power could be deemed valid, it was too confined to warrant the general introduction of

English law, particularly that which would have affected the life, liberty, and property of subjects.¹¹⁷ In other words, if the British cabinet decided to adopt the interpretation that the Proclamation of 1763 had not effected wholesale introduction of English law, some plausible support could be derived for it.

3. *Uncertainty as to status of French law.* The greatest inconvenience to the administration of justice in Quebec was the uncertainty about the continuity of the laws and customs of the French regime. The report recommended that the matter be settled once and for all "by some new act of government, conceived in the most clear and positive words that can be made use of, with an express exclusion or abolition of the other laws which may be imagined to have hitherto been in force."¹¹⁸

4. *Canadian lawyers to be allowed to practise.* With respect to the right of Canadians to practise law, a laissez-faire policy was recommended to combat a possible monopoly by English lawyers who, if lacking competition, might charge exorbitant fees.¹¹⁹

5. *Judges.* The report submitted a plan for the future administration of justice which provided for the division of the province into three judicial districts (Quebec, Trois-Rivières, and Montreal) in each of which a royal court of judicature was to be established. Such courts would be presided over by an English judge appointed by the King with both criminal and civil jurisdiction. These English judges were to be selected from among barristers having at least five years practice and, it is worth noting "a competent knowledge of the French language." Furthermore, for advice on old French laws, as well as for facilitating communication with French-speaking parties, each judge was to be assisted by a Canadian lawyer as his assessor:

...but the Canadian assessors should have no vote or authority to decide the causes in conjunction with the English judges; but should only assist them with their opinion and advice, the whole power of finally deciding them being vested solely in the English judges. This employment of the Canadian lawyers, even in this subordinate capacity of assistants and advisers, would be thought a very gracious indulgence in your Majesty by all your Majesty's new subjects; and many of them, to whom it has been mentioned, have expressed an entire approbation of it. If they had an equal degree of authority with the English judges in the final decision of causes, they would be much more likely than the English judges to abuse it, by reason of their connections in the country, and the enmities and partialities that these connections would give birth to. And besides, there are other reasons, which would make it inexpedient to trust your new Roman Catholick subjects, so lately brought under your Majesty's allegiance, with so great a degree of power.¹²⁰

Obviously Maseres was not yet ready for Canadian judges.

6. *Procedure.* The report recommended permitting pleadings to be written in both languages.¹²¹

7. *Recommendations as to settling the status of French and English law.* The report concluded by proposing four different methods for settling the status of English and French law in the province: (a) a code of laws containing all the laws by which the province was to be governed in the future to the entire exclusion or abolition of every part of both the laws of England and the French laws not set down in the code itself;¹²² (b) a revival of all the pre-session French laws to the exclusion of all English laws except those few which had been introduced by an act of Parliament, and those which were

particularly beneficial and favourable to the liberty of the subject; (c) making English law general with certain exceptions not reduced to writing or re-enacted by new ordinances in favour of the former customs of the country; or (d) making the English law general and reducing exceptions thereto to writing.¹²³

e) Carleton's report.

1.59. Governor Carleton refused to ratify the report his Attorney General had drafted and submitted a report of his own. He recommended as the only method of settling the laws of the province that property and civil rights be governed by revived French laws and that criminal matters be decided according to English law.¹²⁴ It should be noted in this connection that Chief Justice William Hey, in a report submitted at the same time, recommended the revival of French laws of tenure. He did not go so far as to suggest that the whole of French civil law be restored.

It should also be noted that, on the ground that it would endanger the policy of assimilation and anglicization, Maseres appended objections to Carleton's suggestion that French law be re-introduced.¹²⁵ He also envisaged practical difficulties which remind one strongly of more recent objections to bilingual administration of justice:

In the first place, it will make it difficult for any of your Majesty's English subjects to administer justice in this province, as it will require much labour and study, and a more than ordinary acquaintance with the French language to attain a thorough knowledge of those laws.

In the next place, it will keep up in the minds of your Majesty's new Canadian subjects the remembrance of their former government, which will probably be accompanied with a desire to return to it. When they hear the custom of Paris, and the parliament of Paris, and its wise decisions, continually appealed to as the measure of justice in this country, they will be inclined to think that government to be best, under which those wise laws could most ably be administered, which is that of the French king; which, together with the continuance of their attachment to the Popish religion, will keep them ever in a state of disaffection to your Majesty's government, and in a disposition to shake it off on the first opportunity that shall happen to be afforded them by any attempt of the French king to recover this country by force of arms.

And in the third place, it will discourage your Majesty's British subjects from coming to settle here when they see the country governed by a set of laws, of which they have no knowledge, and against which they entertain (though perhaps unjustly) strong prejudices.¹²⁶

He was willing, however, to recommend revival of the old French laws relating to tenure and succession, but would go no further.¹²⁷

1.60. On July 10, 1769, the Board of Trade had already issued a report on the province of Quebec which constituted a distinct reversal of its previous attitudes. The Board now took the view that the 1763 Proclamation had been intended only to ensure to the Canadians the same privileges as were enjoyed by the King's other subjects and that the requirements of the anti-Catholic Test Act had been included in Murray's commission by inadvertence. These anti-Catholic provisions rendered impracticable the constitution of a legislative assembly, while the Council alone was impotent. The authors of the report¹²⁸ commented on the ill effects of the Ordinance of September 17, 1764:

According to the construction put upon this Ordinance by those who framed it, it was to be understood, that not only the proceedings in these Courts were to be carried on according to the modes and forms established in the Courts in Westminster Hall, but also all the principles of the Law of England, relative to Descents, Tenure &c., which totally, or in part differed from the Antient customs of Canada, and also all those local and Municipal Laws, which have from local convenience and consideration obtained in this Kingdom, were thereby introduced into Canada, and become Laws there. In consequence of these opinions and constructions, the customs of Canada, which before governed in all suits concerning property were laid aside; and a further ill effect of the ordinance was, that, instead of that Summary and easy process, which had before been used in the adjudication of questions of this nature, it had the effect to introduce all that delay, perplexity and expence, which accompanies the lowest and most disgraceful practice in this Kingdom; and the new Subjects, who were precluded from serving on Juries, or pleading their own Causes, were compelled to entrust the prosecution of them to men unacquainted with their language and Customs, and who to the greatest ignorance added the grossest rapacity.

It is not to be wondered, that establishments, so inconsistent with the civil rights of the Canadians, and so oppressive in their operation, should have given that disgust, so strongly, and yet so respectfully expressed in their humble Address to His Majesty on this occasion, more especially, when, in a Presentment of a Grand Jury impannelled at a Quarter Sessions, they found their Religion presented, as illegal; themselves not only proscribed, as incapable of the common offices of Society, but also subjected to all the Pains and Penalties inflicted upon Popish Recusants in this Kingdom; and a right claimed by such grand Jury of being the only representative body of the Colony, and of being consulted upon all Measures of Government.

It is true indeed, that His Majesty has been graciously pleased to disapprove of such unwarrantable claims and proceedings, and to direct, that the Canadians shall be admitted to serve on Juries, and to plead as Advocates, in the Courts, but the same erroneous opinion, with regard to the extension of the Laws of England, still prevails; the Laws and customs of Canada, in respect to property, have not gained admittance into the Courts; And His Majesty's new subjects, though they have a full Confidence and reliance on His Majesty's Equity, and His paternal Regard for their interest, do yet express great uneasiness, and wait with impatience His Majesty's Determination on those points, which so materially affect their Properties, Quiet, and Happiness.¹²⁹

The report recommended that an assembly be called; that Canadians be allowed into the public service through the abolition of the Test Act requirements, and that the Council of Quebec be increased from 12 to 15 members, of which at least five should be Roman Catholics.¹³⁰ With respect to juries, the Board of Trade made an interesting recommendation that instead of empanelling Canadians indiscriminately with British-born subjects on all juries, it be provided that all criminal offences be tried by juries *de medietate linguae*, composed equally of Canadians and British-born subjects, except where the accused was charged with murder, in which case all members of the jury should speak the language of the accused.¹³¹

1.61. Early in 1770 the Council in Quebec issued in both French and English an "Ordinance for the more effectual administration of justice and for regulating the Courts of Law in this Province," which was ordered to be published in the *Quebec Gazette*.

Among other things, it provided for the creation of a separate Court of Common Pleas in Montreal; for the right of parties to draft their declaration or statement of claim in either French or English¹³² and for bilingual notices of the sale of immovables seized in execution upon a judgement.¹³³ A similar provision survives in Article 670 of the present Quebec Code of Civil Procedure.

1.62. At a date which it is impossible to determine exactly, but probably sometime around the return of Carleton to England in 1770, 39 distinguished Canadian inhabitants petitioned the King in French for restoration of the laws, customs and regulations under which they had been born. They complained of the expenses which resulted from their ignorance of English procedure and demanded the right to participate fully in the government of the colony.¹³⁴

1.63. The first step in the restoration of the pre-cession laws of property and civil rights, which was to culminate in the Quebec Act of 1774, was the issue by the United Kingdom government on July 17, 1771 of additional instructions to Carleton ordering that all future grants of Crown lands be made under the old French seigneurial system of tenure.¹³⁵

1.64. By orders of the royal court on June 14, 1771 and July 31, 1772, Solicitor General Alexander Wedderburn and Attorney General Edward Thurlow were commanded "to take into consideration several reports and papers relative to the laws and courts of judicature of Quebec, and to the present defective mode of government in that Province, and to prepare a plan of civil and criminal law, for the said Province, and to make their several reports thereon."¹³⁶ Wedderburn's report, dated December 6, 1772, argued that a civilized conqueror changed only such laws and customs as were incompatible with the security of his acquisition and that, consequently, most French law must be deemed to have survived in Quebec.¹³⁷ The report also argued that it would be unjust to deprive the large number of Canadians of their private law not inconsistent "with the principles of the new government" because of a few British settlers.¹³⁸ Thurlow, who reported on January 22, 1773, also felt that the wise conqueror did not disturb unnecessarily the private laws of the conquered.¹³⁹ He expressed the opinion that both the ancient private and criminal laws should be continued as far as possible.¹⁴⁰

1.65. Advocate General James Marriott, in 1774, published a "Plan of a Code of Laws for the Province of Quebec."¹⁴¹ Marriott agreed that the old laws of a conquered nation remain in force until expressly abrogated. He felt that the 1763 Proclamation and Murray's commission had been mistakenly worded because they had been copied from former instruments applicable to different situations. It might be reasonably argued that the 1763 proclamation made English law applicable only to *new* settlers in Quebec while not affecting the laws governing the existing inhabitants. The Ordinances of September 17 and November 6, 1764, which intended to introduce gradually the whole system of English laws, were beyond the powers of Murray's commission.¹⁴² On the other hand, there was no doubt that English criminal law became applicable with the cession.¹⁴³ With respect to the right of Roman Catholics to sit in the proposed assembly, Marriott opined that this right could not exist because of the anti-papery laws.¹⁴⁴

While not prepared to allow Canadian judges, he agreed with the suggestion that English judges should be assisted by Canadian assessors,¹⁴⁵ that written pleadings should

be in either English or French, at the option of the parties, that French forms of procedure should be allowed in civil cases,¹⁴⁶ and that juries *de medietate linguae* be permitted.¹⁴⁷ He also favoured the preservation of French laws of property.¹⁴⁸ Marriott further recommended that publication of the laws of Quebec be continued in both languages.¹⁴⁹

1.66. On November 29, 1773, the principal English inhabitants of Quebec City signed a petition to Lieutenant-Governor Cramahé. A similar petition was signed at Montreal on December 13, 1773. Both petitions asked that a general assembly of the freeholders and planters be summoned immediately. Leading French-speaking inhabitants who had been approached to sign the petition refused to do so because it was in English only and they could not understand it.¹⁵⁰ Also in December 1773, 65 leading Canadian inhabitants of Quebec petitioned the King demanding the preservation of their own laws and customs, as well as claiming the rights of full British citizenship.¹⁵¹

1.67. The English London merchants were not alone in their criticism of the proposed Quebec Act. De Lotbinière, a prominent seigneur, also had reservations which he expressed not only in his own name but also in that of his compatriots. In his view the proposal did not go far enough. He favoured a revival of French criminal law as well as private law. More important, he recommended that French be made the only official language of the province:

Lastly, one point which merits attention and which must be settled is that, since the French language is in general use and in fact almost the only language in Canada, it is obvious that no stranger who goes there for the sole purpose of looking after his interests can look after them properly unless he is thoroughly versed in French, as he is obliged to make use of it continually in all those particular matters that concern him; that it is moreover impossible, given the widely scattered nature of the settlements and dwellings of the country, ever to hope to introduce the English language for general use. For all these reasons and others not specified here, it is essential that an order be issued to make French the sole language in all dealings and that it be fixed as the language for all public business, whether in the law courts or the legislative assembly; for it would seem unnecessarily cruel to reduce almost all those interested in public affairs to the point where they are never aware of what is being discussed and what decisions are being taken in the country.¹⁵²

Chapais has commented¹⁵³ that De Lotbinière obviously was asking more in order to obtain less. Maseres himself, the former Attorney General, testified before a committee of the House of Commons considering the proposed Quebec Act and recommended that both French and English be permitted in court proceedings in Quebec.¹⁵⁴ However, the future Quebec Act was to be silent on the subject of language.

f) The Quebec Act, 1774

1.68. The prolonged debate we have reviewed at length and the many problems which had given rise to it were finally resolved in 1774 with the passing by the United Kingdom Parliament of a law entitled An Act for making more effectual Provision for the Government of the Province of Quebec in North America, better known as the Quebec Act.¹⁵⁵ This statute met most French-Canadian demands for the preservation of their laws and

customs and the elimination of impediments to Roman Catholics. It also marked the repudiation of the assimilationist policies embodied in the 1763 proclamation. Article IV of the Act declared the 1763 proclamation and all the ordinances repealed because they "have been found, upon experiment, to be inapplicable to the state and circumstances of the . . . province." The Act then embodied a veritable new constitution for Quebec.

1. Article VIII re-established French law in relation to "property and civil rights":

. . . all his Majesty's Canadian subjects within the province of Quebec, the religious orders and Communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample, and beneficial manner, as if the said proclamation, commission, ordinances and other acts and instruments had not been made and as may consist with their allegiance to his Majesty, and subjection to the Crown and Parliament of Great Britain; and . . . in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same; and all causes that shall hereafter be instituted in any of the Courts of Justice . . . shall with respect to such property and rights, be determined agreeably to the said laws and customs of Canada, until they shall be varied or altered by any ordinances that shall from time to time, be passed in the said province by the Governor, Lieutenant Governor or Commander in Chief, for the time being, by and with the advice and consent of the Legislative Council of the same, to be appointed in manner hereinafter mentioned."¹⁵⁶

2. The criminal law of England was confirmed by article XI:

And whereas the certainty and lenity of the Criminal Law of England, and the benefits and advantages resulting from the use of it, have been sensibly felt by the inhabitants, from an experience of more than nine years, during which it has been uniformly administered; be it thereof further enacted by the authority aforesaid, That the same shall continue to be administered, and shall be observed as law in the province of Quebec, as well in the description and quality of the offence, as in the method of prosecution and trial; and the punishments and forfeitures thereby inflicted to the exclusion of every other rule of Criminal Law, or mode of proceeding thereon, which did or might prevail in the said province before the year of Our Lord one thousand seven hundred and sixty-four.

3. The anti-papist laws of England were curtailed in their application to Quebec. Not only was freedom of practice recognized by article V, but the hated oath against transubstantiation and papal supremacy was replaced by a general oath of civil allegiance more compatible with Roman Catholic beliefs:

VII . . . I A. B. do sincerely promise and swear that I will be faithful, and bear true allegiance to his Majesty King George, and him will defend to the utmost of my power, against all Traitorous conspiracies, and attempts whatsoever, which shall be made against his Person, Crown, and Dignity; and I will do my utmost endeavour to disclose and make known to his Majesty, his Heirs and successors, all treasons, and traitorous conspiracies, and attempts, which I shall know to be against him or any of them; and all this I do swear without any equivocation, mental evasion, or secret reservation, and renouncing all Pardons and Dispensations from any Power or Person whomsoever to the contrary.

So help me GOD.

4. The Quebec Act did not contain any provision about the language permitted in judicial proceedings although the reintroduction of French law connotes an implicit

recognition of the right of suitors to use French. Furthermore, while several provisions dealt with the adoption, approval, and promulgation of ordinances, no mention is made of the language or languages in which these ordinances are required to be drafted and issued.

1.69. Although the Quebec Act did not refer specifically to language rights, obviously, French law could not be restored without implicitly recognizing the need for some French in judicial proceedings. But can an official recognition of French be read into article VIII of the Act, which reserves to Canadians the enjoyment of "their property and possessions, together with all customs and usages relative thereto, and all their other civil rights, in as large, ample, and beneficial manner, as if the said proclamation . . . had not been made . . . ?" We doubt it. In the first place, one may question whether the British Parliament would have used such devious ways to recognize French. Since the matter has been repeatedly broached in the preceding debate, it can be argued that the Parliament would have referred to it clearly and specifically had it intended to deal with it. It is also doubtful that in the eighteenth century the expression "civil rights" would have been deemed to include language. We shall have occasion to examine in detail in the next chapter whether the expression "civil rights" can be said to include language rights, but we are inclined to believe that the Quebec Act was silent on the question of language because it had ceased to be an issue. Canadian lawyers, as we have seen, had been pleading in French and using either language in written procedures. Ordinances were published in both languages. The effect of the Quebec Act was rather to eliminate lingering doubts as to the applicable laws and to suppress obstacles to the admission of Roman Catholics to official positions.

g) Conclusion: The legal status of French during this period.

1.70. The assimilationist policies expressed in the 1763 proclamation, in Murray's commission and instructions, and in the first ordinances had failed, as had the attempt to attract a large-scale immigration of British subjects to Quebec. In fact, practical considerations had forced the authorities to make concessions in various areas, despite the objections of the English merchants in the province and their London supporters.

Some have argued that the introduction of English law into Quebec by the 1763 proclamation brought with it the abrogation of French as an official language.¹⁵⁷ We have seen, however, that many high British officials maintained that local laws and customs could be abolished only by specific legislation. This point of view was upheld by Lord Mansfield, who stated in the celebrated case of *Campbell v. Hall*¹⁵⁸ that it is an incontrovertible maxim that "the laws of a conquered country continue in force until they are altered by the conqueror." Whatever the initial impact of the 1763 proclamation and subsequent rules, it soon became apparent that the British government had had a change of heart and abandoned its avowedly assimilationist approach to Canada. If English was ever supposed to replace French, both legislative and judicial practice soon established the two languages as equals at the very least. In fact, the English authorities themselves resorted to proclaiming their ordinances in French, a fact which even received subsequent judicial notice. Indeed, Maréchal Nantel, a former librarian of the Montreal Bar, discovered a case

in point which was decided by the Court of King's Bench on January 19, 1813.¹⁵⁹ In it the government of Lower Canada sued Yvon Pierre Talon and others for illegally occupying land upon which the old fortifications of the city of Montreal had stood. Among other delaying measures, the defence raised a preliminary exception against the writ of summons because it was drafted in French, a language which was said not to be that of the sovereign in whose name the writ was issued. Mr. Justice Reid dismissed the exception, commenting:

The French language has been used by His Majesty in his communications to His subjects in this province, as well in his executive as in his legislative capacity, and been recognized as the legal means of communication of His Canadian subjects. Courts of Justice have at all times used this language in their writs and processes as in their other proceedings, as well before as since the Ordinance of 1785.

It is for the benefit of the subjects that this was done, and the defendant cannot be permitted to say that he will not be sued in the language of his country.¹⁶⁰

As Eugène Gosselin recently wrote:

In fact, the parties to the Treaty of 1763 and consequently the British authorities must have thought it quite useless to deny the French Canadians a means of expression in their community life, that is, their language, once it was recognized that they could live in a politically and socially organized community. The British authorities did more than use French in their relations with their new subjects. They also used French as their own language of work and for correspondence. Nothing gave greater satisfaction to British pride than to be able to show a knowledge of French at least equal to what one would find among the best educated people in French Canada. Therefore the problem of language and culture did not constitute and could not constitute a political problem during the first ten or so years of the existence of the colony. Justice was carried out in French. As early as 1764, the King dispensed with his translators and interpreters in the administration of justice.¹⁶¹

3. *Period of Quebec Legislative Council, 1774-91*

1.71. As it was deemed "inexpedient to call an Assembly," article XII of the Quebec Act provided for an appointed Legislative Council consisting of 17 to 23 members with power to make ordinances "for the peace, welfare, and good government" of the country. Since this Council was not an elective assembly, article XIII forbade it to levy taxes or duties except for local purposes. Article XVI stated that the quorum of the council was at least half of its members. Furthermore, article XIV enacted that every ordinance should be submitted to royal approval within six months. Article XV finally prohibited ordinances touching religion or imposing penalties greater than a fine or imprisonment for three months without prior royal approval.

1.72. Since the Quebec Act lifted religious obstacles to their participation in the administration of the province, Canadians were admitted to the Legislative Council. As a consequence, both French and English were used in its proceedings from the very first session in 1777. The debates and records of the Council were in both languages.

1.73. Article IV of the Quebec Act repealed all previous ordinances of judicature as of May 1, 1775. Article XVII stated that the creation of the Legislative Council should not

be construed so as to prevent the British government by Letters Patent "erecting, constituting and appointing, such Courts of criminal, civil ecclesiastical jurisdiction . . . and appointing . . . the Judges and Officers thereof." For a while, there were no courts in the province of Quebec. To fill the void, on April 27, 1775, Governor Carleton appointed Adam Mabane, Thomas Dunn, and Jean-Claude Panet as magistrates for the district of Quebec, and John Fraser, Jean Marteilhe, and René-Ovide Hertel de Rouville for the district of Montreal. They were called Conservators of the Peace. Hertel de Rouville had been a judge at Trois-Rivières under the French regime.¹⁶² Panet, Marteilhe, and Hertel de Rouville were thus the first French-speaking judges appointed since the suppression of the anti-Catholic impediments. However, these Conservators of the Peace were soon suspended because the outbreak of war in the Thirteen Colonies resulted in a declaration of martial law.

1.74. On February 25, 1777 the Governor-in-Council passed an Ordinance to Regulate the Proceedings in the Courts of Civil Judicature in the Province of Quebec.¹⁶³ The ordinance divided the province in two judicial districts (Quebec and Montreal) and established in each of them a Court of Common Pleas, having original civil jurisdiction. Article I of the ordinance is noteworthy because it provided that upon presentation of a "Declaration . . . setting forth the Grounds of . . . Complaint against a Defendant, and praying an Order to Compel him to appear and answer thereto," a judge would have to grant a writ of summons *in the language of the Defendant*.¹⁶⁴ The ordinance, on the other hand, did not specify in what language the declaration, which the plaintiff had to attach to the writ eventually issued, had to be drafted. It will be recalled that under the Ordinance of February 1, 1770,¹⁶⁵ the language of the writ was optional, as it is in Quebec today.¹⁶⁶ On the other hand, article XVII of the Ordinance of February 25, 1777, which outlined the procedure to be followed for publication of notices of sale of seized immovables in the *Quebec Gazette*, did not indicate whether bilingual publication was required. The Ordinance of February 1, 1770 stated that publication had to be in both languages.

1.75. On March 4, 1777, the Legislative Council passed an ordinance, its sixth, requiring publication of all its ordinances in the *Quebec Gazette*.¹⁶⁷ No language was specified, but the records indicate that ordinances were published in both languages.

1.76. In 1785 the Council passed an ordinance establishing trials by juries in commercial actions and for personal wrongs. Cases between two British-born subjects were to be tried by a jury composed of Englishmen; cases entirely between Canadians were to be decided by a Canadian jury; and cases in which one party was Canadian and the other British-born were to be tried by mixed jury.¹⁶⁸ It should be noted that this ordinance only dealt with civil cases and that juries *de medietate linguae* in criminal cases were not reintroduced until 1787.

1.77. In 1787, the Council adopted an ordinance continuing this ordinance for another two years and providing for the recording in both the Court of Common Pleas and in the Court of Appeal of all rulings on French laws, customs, or usages in order to protect the Canadian subjects "in the enjoyment of all the benefits secured to them for their property and civil rights."¹⁶⁹

1.78. In the same year the Council approved an ordinance declaring that the court had discretion "in such manner as the said Court shall adjudge proper, to give the party

prosecuted, in any Criminal Cause, Jurors, for his trial, one half of whom, at the least, may in the judgment of the Court, be competently skilled in the language of his defence, if the same be either the English or French language. . . ."170

1.79. At a sitting of the Quebec Court of Appeal held on January 29, 1788, general rules of practice were adopted. Of particular interest is a provision that all reasons for appeal should be in both languages.¹⁷¹

1.80. Under the Quebec Act bilingualism was the rule in judicial proceedings and records. If a few isolated instances are an indication, it may have been the right to use English rather than the right to use French which was sometimes jeopardized. On November 10, 1787, Sir Guy Carleton, now Lord Dorchester, wrote to Viscount Sydney that in consequence of an address and petition an inquiry had been ordered to be made by the Chief Justice William Smith of the Court of Appeal into the conduct of certain judges of the Court of Common Pleas. This inquiry began on June 11, 1787 and concluded November 6 of the same year.¹⁷² In the course of the investigation testimony was offered by knowledgeable witnesses that the language rights of suitors were not always respected in Common Pleas. Judge Hertel de Rouville, to whom we have already referred,¹⁷³ was apparently irresponsible or incompetent in this regard. The following question was put to Mr. Le Pailleur, French Clerk of the Court of Common Pleas at Montreal: "Were the different practitioners allowed to prosecute and defend their cases orally in the same language as their written pleadings? Or, notwithstanding that the English practitioners were permitted to do so, were they not obliged to translate some of their cases and were they not ordered by the Court to address the Bench and Canadian practitioners in the French language? Declare."¹⁷⁴

Le Pailleur's reply to the question was, "It appears that Mr. de Rouville has required lawyers to translate their pleadings as he did not understand English perfectly or to repeat in French what they had said in English."¹⁷⁵

John Burke, English Clerk of the Court of Common Pleas at Montreal, was also examined. The following exchange of questions and answers occurred:

Question 20. Do you think Mr. Judge Southouse sufficiently skilled in the French Language for the dispensation of Justice on proceedings had in the said Court in the French Language?

Ad. 2. He does not think that he can without assistance, having applied often for assistance, information, and explanation to understand what passed, but that he has informed the deponent often, that by reading French writings he understood their scope and contents, and that he [had] known him to have received the assistance of Mr. de Rouville in translating what had passed in French.

... 3. Have you, or have you not heard Mr. Judge Rouville silence or stop the Lawyer or Advocate who has been explaining to Mr. Southouse what the parties or witnesses said, and declare that he the said Judge would explain to Mr. Southouse, and so did explain.

Ad. 3. I think he has.

... 4. Do you think Mr. Judge Rouville understands or is skilled in the English Language?

Ad. 4. He thinks that he has some knowledge of it but that he is imperfectly skilled in it.¹⁷⁶

Judge de Rouville's conduct was also put in question as a result of evidence brought by Mr. William Dummer Powell, an advocate who later became Chief Justice of Upper Canada. In the examination of Powell, the following exchange took place:

- Interrog: 49. Have the respective Practitioners been allowed to prosecute and defend their Causes at the Bar in the same Language in which their written pleadings were, or have not the English Practitioners, notwithstanding their written pleadings, been ordered by the Court to address themselves to the Bench and the Canadian Practitioners in French? Declare.
- Ad. 49. The English practitioners have been obliged to address themselves to the Bench in the French Language, although two or three Judges were old subjects, and it has more than once happened to myself that having been obliged to address myself to the Bench in the French tongue when only Messrs. Southouse and De Rouville were present the latter has translated what I have said, into very good English for Mr. Southouse, who does not understand French.¹⁷⁷

De Rouville also once forced an English defendant who had no counsel to give evidence in his own case in French, despite the latter's protests.¹⁷⁸ Finally, Mr. James Walker, an English-speaking practitioner was questioned, and complained: "The English Practitioners have been absolutely obliged to plead in French, and frequently to have their written pleadings translated into that Language, which has been attended with a heavy expence to their clients, & I know not an instance of the Canadian practicers being obliged either to speak, or to translate or cause their pleadings to be translated into English for the information of the English Judges."¹⁷⁹

1.81. In both Quebec and Montreal, French and English clerks kept their books separately. The general rule was for the case to be entered in the book kept in the language of the defendant, but in practice it was impossible to divide court business according to language.¹⁸⁰ Occasionally the clerks had to substitute for each other because of absence due to illness or other cause. Seeing that lawyers were by rule allowed to plead in either language, a loose bilingualism developed which played havoc with the minute books. In one judgement the judges started in English, lapsed into French for a couple of sentences, and then once more reverted to English.¹⁸¹ On considering the circumstances, it is strange that both the two Quebec clerks and Le Pailleur in Montreal disclaimed an adequate command of both languages.¹⁸² Professor Hilda Neatby reports that the only well-kept registers and minute books were those of John Reid, who assumed the office of clerk at Montreal in 1787.¹⁸³

1.82. The provincial Court of Appeal was hampered in its deliberations by the fact that some of its members did not know both languages. Decisions were not in all cases based on the individual judgement of the members of the Court, since documents and pleadings might be in either language and, though the English-speaking members were bilingual, some of their Canadian colleagues were not. The latter on occasion had to depend on the hasty verbal account of an obliging English brother.¹⁸⁴

1.83. Some provision was made for official translation services in the administration of justice under the Quebec Act. Professor Neatby reports that during the period from

1777 to 1786 an interpreter for all the provincial courts was paid an annual salary of £80, which at that time was a fairly handsome income.¹⁸⁵

1.84. Buchanan reports the following instance of bilingualism as practised in the Court of King's Bench:

At a session of the Court held in 1784, it is recorded that the Sheriff reminded the Court that all persons sentenced to be "burned in the hand in the Court of King's Bench may receive their punishment in this Court agreeable to sentence." The punishment consisted in the prisoner being brought from the gaol into the court-room and made firm by an iron hand at the back of the dock, the palm part of his own hand being opened. The red-hot iron, sometimes ending either in a crown or some other device, was held ready by the common hangman, and the punishment was inflicted in the centre of the palm. The instrument being ready, the prisoner was informed that the moment it touched his flesh, he could repeat as fast as he could the words "Vive le Roi" three times and at the end of the third repetition, the punishment would cease, or the words "God save the King," if he were an English prisoner.¹⁸⁶

Buchanan does not specify whether it was sufficient to cry "God save the King" once or if it too had to be uttered three times.

1.85. In 1790 provision was made for the adequate maintenance and protection of laws and court records dating from before the cession since these documents were in danger of either loss or damage. An Act for the better preservation of the ancient French records¹⁸⁷ was adopted and read in part:

WHEREAS there are several hundred volumes of Papers, Manuscripts and Records, very interesting to such of the inhabitants of this Province, as hold property under Titles acquired prior to the conquest, which ought so to be disposed of, as to give a cheap and easy access to them; and it is expedient that they be kept in a state of preservation and safety, and that measures be pursued to make them known and useful; and whereas the ancient records of the District of Montreal require a speedy attention to preserve them from danger and ruin, and the erection of the New District of Three Rivers, separated from the Districts of Quebec and Montreal renders it necessary to restore to the said District of Three Rivers, such of the Public Records as may be found elsewhere and more immediately concern the inhabitants of the said district of Three Rivers: be it therefore enacted by His Excellency the Governor and the Legislative Council, and it is hereby enacted by the authority of the same, that it shall and may be lawful, for the Governor or Commander in Chief, for the time being, by and with the advice of the Council, to make orders from time to time touching the arrangement, removal, digesting, printing, publishing, distributing, preserving and disposing of the same papers, manuscripts, and records, or any parcel thereof; and every person possessed of any of the said papers, manuscripts and records, anciently appurtenant to any Public Office or deposit, prior to the conquest, who shall surrender the same, as by such order may be required, shall be as justifiable therefor in the law, as if the same were delivered up in pursuance of any Act or Ordinance for such purpose specially made and provided; and it shall be as unlawful for any person possessed of any such public paper, manuscript or record, to withhold or detain the same contrary to such order, as if the same was withheld and detained against any Act or Ordinance of the Legislature, expressly commanding the surrender and restitution of the same, to the proper Office to which the same might belong or appertain.

1.86. The victory of the Thirteen Colonies in the American War of Independence led to the massive emigration to Canada of those whose loyalties lay with the British Crown rather than the new republic. While these Loyalist elements were not solidly English-speaking or Protestant (there were large German groups among them, and many of the Highlanders were Roman Catholic and spoke Gaelic), they were accustomed to traditional British freedoms. Their views and attitudes were those of the American colonies from which most of them had come. They were not satisfied with an appointive council and soon began to press for a new and free constitution, and particularly for a representative assembly. The *émigrés* living in that part of Quebec which was to become Upper Canada demanded a separate province and a local assembly to rule it. Although the French Canadians appeared indifferent to an assembly, which they had never had before, the English-speaking minorities in Montreal, Sorel, and Quebec were avid for an assembly to be chosen entirely among themselves. They opposed a separate province on the upper St. Lawrence, fearing that they would be swamped by the French majority in Lower Canada.¹⁸⁸

Assimilationist tendencies again appeared. The Montreal *Herald* in 1789 carried an article by Isaac Ogdon, a young Quebec lawyer who was in England at the time. An excerpt from the article, which first appeared in the London *Evening Post*, reads as follows:

The Canadians are to be considered as attached to their former government. Facts during the late war clearly support this assertion. Nothing will have greater tendency to anglify them than illuminating their understandings, when they will discern the advantages resulting from the mildness of a British Government. To effect this, free public schools ought to be established in different parts of the province to teach the inhabitants the English language. The laws of England ought to be introduced; and to make it the interest of the inhabitants to learn the English language, all the proceedings of the courts of law ought to be in English. And every measure should be taken to root out the predilection which they still retain for their former king and government.¹⁸⁹

In a letter which he wrote to Evan Nepean on February 9, 1789, Hugh Finlay ventured a thought which showed that dreams of anglicization of Quebec were not dead. He said, "We might make the people entirely English by introducing the English language. This is to be done by free schools, and by ordaining that all suits in our Courts shall be carried on in English after a certain number of years."¹⁹⁰

The state of affairs in Canada became such that the *Quebec Act* could no longer satisfy both national groups. English-speaking and Loyalist elements were anxious for an elective assembly and the rule of British law, while experience had shown that the French Canadians would not readily give up their laws, or their language. The Imperial Parliament sought to resolve the potential conflict and ensure the tranquility of British North America by passing the Canada Act, better known as the Constitutional Act of 1791.¹⁹¹ This statute effected a political and territorial division of the province of Quebec which corresponded to the linguistic and cultural division. It will be discussed in the next section.

*C. The Constitutional Regime: Lower and Upper Canada, 1791-1840**1. Provisions of the Constitutional Act, 1791*

1.87. The primary purpose of the Constitutional Act of 1791 was to divide what was then the province of Quebec into Upper and Lower Canada. It was hoped that the division would result in giving the English and American colonists a majority in Upper Canada and the French-speaking Canadians a majority in Lower Canada.¹⁹² This was particularly important since section 2 of the Act provided that there should be in each province a Legislative Council appointed and an Assembly elected which should have power "to make laws for the peace, welfare and good government thereof." Section 4 gave Canadians full right to sit on the Legislative Council of either province: "... no person shall be summoned to the said Legislative Council, in either of the said provinces, who shall not be of the full age of Twenty-one years, and a natural-born Subject of his Majesty, or a subject of his Majesty naturalized by Act of the British Parliament, or a subject of his Majesty, having become such by the Conquest and Cession of the Province of Canada." Section 22 guaranteed the right of French Canadians to vote.

While the French language was not expressly provided for in the Act, it was recognized inferentially in certain of its provisions. For instance, section 29 stated that the oath of a member of the Legislative Council or Assembly could be administered in either language, and section 24 that electors could be sworn in either English or French. Section 33 decreed that except where expressly repealed by the Act existing laws should remain unchanged in both provinces until a decision to the contrary was made by the Parliaments of each of them.

2. Bilingualism in Lower Canada

1.88. The first sitting of the first legislature of Lower Canada took place at Quebec on December 17, 1792. Out of 50 deputies, 34 were French Canadians.¹⁹³ In English parliamentary tradition the Speaker of the House was known as "the first commoner," or the foremost of the citizens who constituted the Commons. A Commons of Lower Canada had been created by the Constitutional Act. Furthermore, the vast majority of the electorate of the province was of French origin. It would thus have seemed reasonable that the first commoner should be a man of this origin. Yet there was major opposition to the election of a French-language Speaker. In the words of Chapais: "Unfortunately the representatives of the English minority did not understand that political convention required them to adopt an attitude of sincere acceptance of the situation which circumstances had forced on them. They were unable to see that such acceptance—respect for the majority—would be not only a just act but also a shrewd one with a view to the future."¹⁹⁴ The English-speaking deputies were too short-sighted to be tactful and a battle took place over the speakership.

Messrs Dunière and De Bonne had proposed Jean-Antoine Panet as Speaker. They were countered by the McGill nomination of William Grant. Then Mr. Lees nominated McGill and Walker nominated Jordan. This spate of nominations by the English-speaking

minority set off the first parliamentary debate in Lower Canada. The debate, of course, had implications beyond the election of a Speaker whose command of either language would be a source of convenience to his *confrères*. Rather, it revolved around what was to be the official tongue of the colony more than 30 years after its conquest by an alien power. One of the most startling events of the debate was a declaration by Pierre-Louis Panet, a cousin of the candidate proposed by Dunière and De Bonne, in favour of making the English language official:

I would like to express my feelings about the need for the Speaker, whom we are about to choose, to know and speak both languages equally well. In what language is he to address the Governor? In English or French? To answer this question, I ask you whether this colony is or is not an English colony? What is the language of the sovereign and of the legislature from which we hold the constitution that brings us together today? What is the language generally spoken in the empire? What is the language that one part of our fellow colleagues speak? And what will be the language of the other part and of the whole province some day? I am a Canadian, the son of a Frenchman. My natural language is French, for because of the division which has continued to exist between Canadians and English since the cession, I have not been able to become proficient in English. So my testimony is not suspect. . . . I would say that it is absolutely necessary that Canadians adopt in time the English language. This is the only means of dispelling the aversion and suspicion that the language differences will always keep alive between two peoples united by circumstances and forced to live together. But while awaiting this happy revolution, I think that it would be only proper that the speaker whom we select is able to express himself in English when he addresses the representative of our sovereign.¹⁹⁵

Jean-Antoine Panet, the French-speaking candidate, was in a delicate position, for he had acquired only a restricted familiarity with the English language. He intervened in the debate to declare that the King of England spoke all languages and had concluded treaties with all nations in their own languages as well as in English, that the islands of Jersey and Guernsey were French, and that any objection founded on the language of a member could not prevent him from being Speaker.¹⁹⁶

The French-speaking deputies could not back down, especially in view of the tone which the discussion had taken. Joseph Papineau arose to declare that "we, no doubt, had the happiness to be a branch of the British empire, but that it could not be supposed any Canadian ought to be deprived of his rights because he did not understand English."¹⁹⁷ Following Papineau's speech, William Grant proposed an immediate adjournment of the debate. However, the Canadian majority was resolved to see the issue through, and insisted that the vote be taken then and there on the motion to elect Panet. Accordingly, the motion to adjourn was defeated and the vote on the principal then took place with this result: 28 to 18 in favour of Panet.

The 16 English-speaking representatives had formed a bloc, and two French-speaking deputies, Pierre-Louis Panet and M. Dambourgès, had joined them. Chapais said of the event, "Thirty-two years after the conquest, he who could make us fear our annihilation, ringingly proclaimed our national survival."¹⁹⁸

1.89. This debate only foreshadowed the more serious question of what was to be the language of the Assembly's proceedings and of the publication of statutes. After the

Lieutenant-Governor had delivered the Speech from the Throne, the Legislative Assembly got down to the task of drawing up its rules and standing orders. It was then that the serious question of language arose. From the beginning of the British domination until the debate on the election of the Speaker, the question of language had never entered the realm of public controversy because until then the practice of respecting French in the administration of justice and in the publication of laws had eliminated most causes for alarm.¹⁹⁹ Because the legal status of the French language had never been a matter of dispute, it was indeterminate. Most of the attention during the civil regime had been concentrated on the use of French in the courts, although Baron Maseres envisaged the use of French in the Assembly.²⁰⁰ From the very first session of the Legislative Assembly of Quebec held on December 17, 1792 the practice was to use both languages. When at this first session the Lieutenant-Governor invited the Assembly, which he had summoned to the Legislative Council chamber, to choose a Speaker for itself, this invitation, as reported in the minutes of that day, was repeated in French by his order and in his presence.²⁰¹ The motion made by James McGill to postpone the election by one day was also repeated in French, and the amendment of Pierre-Louis Panet, originally made in French, was translated into English. It thus appears that the use of both languages was admitted without dispute at the very beginning of the new constitutional regime without any formal decision of the house. The practice was the same with regard to bills.²⁰²

The first discussion on the language of bills took place on December 27, 1792, on the occasion of a resolution proposed by William Grant, which, as amended by Joseph Papineau, was passed:

That it be an instruction to the committee of the whole House, charged with the correction of the minutes (or journals) that the digest they may prepare as the journal of the House, from the commencement of the session to the time of the reference, be in the english language, as necessary for the original record thereof: and, that translations of the said journals, be made in the french language for the use of such as are desirous of the same.²⁰³

The resolution was finally adopted by a vote of 21 to 15 on the motion of Grant, who accepted Papineau's amendment. The amended motion was the same as the original until the words "in the english language," the rest being modified as follows: "or french language, as it may have been entered in the original minutes, without drawing into precedent for the future."²⁰⁴

During the preparation of the regulations for the conduct of the Assembly there was diversity of opinion on the mode of using both languages. However, there was none as to the usage itself. Article 4 as first drafted did not speak of language at all, but merely declared that no motion could be discussed unless the Speaker had first read it from the Chair. However, the Assembly passed without debate the motion to require a reading in both languages. The text of the article as finally adopted by a majority of 33 to seven was as follows: "That no motion shall be debated or put, unless the same be in writting [sic] and seconded, when a motion is seconded, it shall be read in English and in French by the Speaker, if he is master of the two languages, if not, the Speaker shall read in either of the two languages most familiar to him, and the reading in the other language shall be at the table by the clerk or his Deputy before debate."²⁰⁵

In January 1793 a committee was formed to prepare draft regulations for the procedure of the House. The members of this committee were Papineau, Richardson, Grant, Walker, Young, McGill, De Bonne, De Lotbinière, and De Rocheblave. One of the questions which this committee had to consider was the language in which the proceedings of the Assembly were to be recorded. De Bonne drew up the following draft motion:

Considering that the Assembly of this Province is composed of English and Canadians, that the great majority of Electors and Representatives are Canadians and speak and understand the french language only.

That the ancient Laws, Customs and Usages of this Country were preserved by an Act of the 14th year of George III. chap 83, with the introduction of the criminal Laws of England in this Province.

That the Act of the 31st year of his Majesty, chap 31, has made no alteration as to these particulars, but a Provision concerning the rights of the Protestant Clergy.

That the consequence of these Acts are, that the Laws by which we are governed are in two languages, and that the Acts to be enacted by the legislation of this Province will result from these different Laws.

That present circumstances impose, a necessity to establish a principle, which is neither repugnant to justice nor to the reason of the thing itself.

That as this principle must be taken from the Acts of Parliament that relate to our Province, and from the benign intentions of our Most Gracious Sovereign, who has the general good of all His Subjects indistinctly at heart, their security and the preservation of their property.

Question: — Shall the resolution of the committee marked AA be adopted as a rule of this House or not? *videlicet*.

Resolved that this House shall keep its journal in two registers, in one of which the proceedings of the House and the motions shall be wrote in the french language, with a translation of the motions originally made in the english language; and in the other shall be entered the proceedings of the House and the motions in the english language, with a translation of the motions originally made in the french language.²⁰⁶

The rationale behind the foregoing motion was that the laws of Lower Canada had a double origin, the civil law being French and the criminal law being English. Furthermore, the legislature, like the population, was composed of two elements, one English and one French. Accordingly the journals of the Assembly should be kept in both languages. The rule proposed did not imply the primacy of either language. Nevertheless the English minority in the House attempted to make the English language official, to the exclusion of the French. On January 21, 1793, after a motion had been made to the effect that De Bonne's draft rule be adopted, Richardson proposed the following amendment:

But although the journal shall thus be kept in english and in french, and all Bills that may be brought in, or laws that may be enacted, shall be translated from the one into the other language, at such stage of their progress as may be determined upon; yet in order to preserve that unity of legal language indispensably necessary in the Empire, and touching any alteration in which a subordinate legislature is not competent; the english shall be considered the legal text.²⁰⁷

The proposed amendment set off a lively debate, which lasted for three days. Those who spoke in favour of the English amendment were Richardson, Pierre-Louis Panet, Grant, McGill, Lees, and Young. On the French side were De Bonne, Papineau, Bédard, De Lotbinière, Taschereau, and De Rocheblave. The complete report of this debate does not

survive. However, the *Quebec Gazette* of February 14, 1793, carried the following comment:

Those who spoke most and best for the English Text were Messrs. Richardson, Pierre-Louis Panet, Grant, McGill, Lees and Young; those for the French Text, Messrs. DeBonne, Papineau, Bédard, and the above-mentioned papers. The arguments on the side of the Language of the Empire appeared to me sound, substantial and conclusive; those on the other side specious declamation without meeting the question fairly — The reasoners on the English side, threw down a fair challenge to the others to shew that such a claim as to enact Laws in a Foreign Language was ever granted by the British Nation to any other Colony or Province of the Empire; or that other Nations proceeded upon such a maxim as that claimed; they asserted that our Laws here since the Conquest have been uniformly made in English with a French Translation, and that no Petition to the Throne or Parliament from this Country, had ever complained of it as a Grievance. — In my humble apprehension these points required an explicit refutation before any other argument could be listened to by any impartial man. — Surely none will be so hardy as to maintain, that we can with decency, or of right insist upon this claim, if a similar one was never before granted to any other people.

The records of the speeches of Papineau, De Bonne, and Bédard have disappeared. However, those of De Lotbinière, De Rocheblave, and Tachereau, which were published in the *Quebec Gazette*, indicate the zeal with which the French party defended the cause of its language. De Lotbinière began his speech as follows: “The largest number of our voters being placed in a peculiar situation, we are obliged to set aside the ordinary rules and to demand the use of a language which is not that of the empire; but being as fair to others as we hope they will be to us, we would not wish our language to banish the language of the other subjects of His Majesty. We ask that both be permitted.”²⁰⁸

He replied to the arguments of his English-speaking adversaries by reminding them that all British subjects were equal, regardless of the language they spoke, and continued by noting that the intent of the British Parliament in passing both the Quebec Act and Constitutional Act was to preserve for the Canadians the free use of their language. With reference to the former statute, he said, “. . . can we believe that while assuring us of all our rights as citizens, while preserving all our property laws which are in French, he would refuse to listen to us when we speak in that language.”²⁰⁹ And in referring to the Constitutional Act he said, “If we read the debates of the House of Commons during the passage of this bill, we will understand the reasons for it. It is so that the Canadians may have the right to make their laws in their own language and according to their customs, precedents and the present state of their country.”²¹⁰ There was not, he observed, a single provision in the Constitutional Act which proscribed the use of French and, had the British Parliament intended to introduce English as the only language of the Quebec legislature, it would have adopted an express measure to that effect. He concluded by asserting that it was not linguistic assimilation that would make the Canadians more loyal to the British Crown:

Those Canadians who only speak French have shown their attachment to their sovereign in the least equivocal manner. They have helped defend the entire province. This city, these walls, this very room where I have the honour to speak, have been saved in part by their zeal and courage. We have seen them join the faithful

subjects of His Majesty and repulse the attacks which people who speak good English have made on this city. Thus it is not, Mr. Speaker, uniformity of language which makes people more loyal and more united.²¹¹

De Lotbinière was followed by De Rocheblave and Taschereau, both of whom spoke vehemently against Richardson's amendment. The former asserted that it would be impolitic to adopt the amendment, and Taschereau that it would be absurd. The debate ended with the vote of 26 to 13 against the Richardson amendment.²¹²

On the following day, January 22, 1793 Richardson arose to present a new motion which was preceded by a belligerent preamble:

No subordinate Legislature is competent to making any alteration in the fundamental maxims necessary to the sovereignty of the Parent State, and equally so to the true interests of every part of the empire—the claim set up of making laws to bind British subjects in any other language but English, is illegal, unprecedented, impolitic, subversive of our union with and dependance upon the Mother country, and in direct contravention of the constitution by which we sit here. . . .

To be governed by Laws made in the English Language, is the birth right of every British subject; and no power on earth, but the British Parliament, can disfranchise him of that inherent privilege; . . .

If after thirty years connexion with Great Britain, so few Canadians have taken the pains to learn English; it may be a strong argument for insisting upon the laws continuing in English; but a very bad one for the contrary, as that would have a tendency to prolong instead of correcting the evil.²¹³

The Assembly set aside this preamble and did not include it in the official journal.²¹⁴ Divested of the preamble, Richardson's motion read as follows:

That all Bills brought into this House or that may pass into a Law, may be originally brought forward, either in the english or french language.

That if brought forward in one language only, they shall be translated into the other, in such manner as the House may order, before they can be considered to have received a second reading; and that all amendments, made to them, shall be equally put into both languages, in such manner as this House may order for the information of all the Members of this House; but that it shall be considered and understood that the english language, being that of the Empire of which it is our glory to form a small part, shall be the legal text.²¹⁵

This motion was rejected by a vote of 27 to nine, with two English-speaking members, Grant and McNider, voting with the Canadian majority.²¹⁶

The House then took into consideration the following motion: "That Bills relative to the criminal laws of England in force in this province, and to the rights of the Protestant clergy, as specified in the act of the 31st year of His Majesty chap. 31, shall be introduced in the English language; and the Bills relative to the Laws, customs, usages and civil rights of this Province, shall be introduced in the French language, in order to preserve the unity of the texts."²¹⁷

Lees proposed as an amendment that bills should be presented in either French or English accompanied by a translation, but that English should in all cases be considered the official language of the Assembly. This amendment was rejected by a vote of 25 to 11.²¹⁸ The rule as originally introduced was then adopted. Finally, on January 23, 1793 the Assembly adopted the following resolution:

IV. That such Bills as are presented shall be put into both languages, that those in English be put into French, and those presented in French be put into English by the clerk of the House or his Assistants, according to the directions they may receive, before they be read the first time—and when so put shall also be read each time in both languages—well understood that each Member has a right to bring in any Bill in his own language, but that after the same shall be translated, the text shall be considered to be that of the language of the law to which said Bill hath reference.²¹⁹

The effect of the adoption of this rule was to put both languages on a plane of equality and to make both official. This official bilingualism, however, was not yet complete as the language of bills depended on the area of law to which they applied—those concerned with the civil law being drafted in French and those concerned with the criminal being drafted in English. This was an attempt to recognize and preserve the differing origins of the law of Lower Canada. Chapais spoke as follows of the debate on language and its culmination: “Our language came out of this great debate honoured and strengthened. It had undergone a baptism of fire. It had asserted itself as a parliamentary language. It had been officially established. And the heat of battle which ended in victory for our language gave it even more radiance and lustre.”²²⁰

1.90. The English colonial officials had followed the debate with interest, and there was no doubt that their sympathies lay with the English-speaking minority. On July 3, Lieutenant-Governor Clarke wrote to Hendy Dundas, minister of the Interior in the United Kingdom Government, reporting that while the journal of the legislature was to be kept in both languages, during the past session not a single bill had been passed in any language but English; moreover that, if an original bill had been sent from the Assembly to the Legislative Council in the French language, the Council would have refused its assent for this reason alone. In this respect Clarke shared the opinion of one honourable member, who, in writing to a friend, made the following observation: “The consequence of so extraordinary a decision will be that the council will probably reject the French text, and if that is not the case, the Government certainly must, as an English sovereign has no authority to sanction Laws in a foreign language. The function of Government will therefore probably be stopped—a prorogation or dissolution must ensue—and a new act take place.”²²¹ Included in the letter was a request for instructions as to what the Governor should do, if it should happen that an urgently required law were passed in the French language by both chambers, and the Governor were asked to give his assent.²²²

Lord Dorchester, who returned to Quebec on September 24, 1793, received the reply from the minister to Clarke’s letter. In this letter the minister expressed the opinion that it was necessary that the laws of the province be passed in the English language. He saw the practice of passing laws in both languages as a potential source of confusion. At the same time he had no objections to a permanent rule requiring that any bill be introduced in the Assembly with a French translation, provided that the bill itself passed in English.²²³

This reply indicated that while Whitehall was not ready to recognize any language but English as the official text of legislation of a British colony, it was prepared to accept the existence of practical bilingualism. Chapais has concluded that from 1791 to the dissolution of the Legislative Assembly, the official language of the province was *legally* English.

However, for almost 50 years parliamentary records and statutes were published and printed officially in the two languages and, in fact, the French language was on the same plane as the English even though full official recognition of the French language did not come until later. In the meantime the language of the legislature was English because the official text of the laws was English, and the language in which the representative of the King expressed himself in the Parliament of Lower Canada was English only.²²⁴

It is impossible to test the truth of Chapais' assertion of factual, as opposed to legal, bilingualism under the constitutional regime. Unfortunately the copies of the original texts of the laws, which would have indicated whether or not they were in fact passed in English alone, were destroyed when the Parliament Building at Montreal was put to the torch by a mob in 1849.

1.91. While because of the loss of the records a doubt persists as to the language in which the statutes of Lower Canada were passed after 1791, there is no question that they were in fact published in both languages. From the beginning, several statutes were voted to provide that all laws of Lower Canada be printed in English and French. This was merely a continuation of the practice followed during the military and civil regimes. The first of these statutes was passed in 1793.²²⁵ This Act provided for the speedy printing of all laws passed by the legislature. Although it made no specific mention of the language in which the statutes were to be printed, the practice at the time was to print the English and French versions on opposite pages. Three years later, in An Act for making, repairing and altering the Highways and Bridges within this Province and for other purposes,²²⁶ provision was made for the publication in both languages of abstracts of the regulations to be printed and distributed to the clerks and *grand voyers* (road supervisors).

In 1803 An Act for the More Ample Publication of Certain Acts of the Provincial Parliament stipulated that clergymen should "publicly read after Divine Service in the morning, at the Presbytere or other usual place, where the legal assemblies of each Parish, are held, all Acts and Proclamations or any part thereof, when and so often as he shall be thereunto required by the Governor, Lieutenant Governor, or Person administering the Government of this Province for the time being."²²⁷ As no mention was made of the language in which such reading was to be undertaken, the priest or minister must have had the option of using the language spoken by his congregation. In the same year provision was made for the bilingual printing and distribution of militia regulations.²²⁸

1.92. As had been the case under the military and civil regimes, both languages continued to be respected in the courts after the splitting of Quebec into Upper and Lower Canada. In 1793 the Legislative Assembly of Lower Canada passed a statute providing that all previous laws governing the practice of courts of criminal and civil jurisdiction, as well as previous rules of practice, would continue in force unless expressly repealed or varied.²²⁹ The effect of this provision was, of course, to continue those laws which stipulated the use of English and French in certain aspects of judicial proceedings. Provision was made for a French translator for the Court of King's Bench. In 1794, this position was occupied by X. de Lanaudière who received a salary of £200.²³⁰

On April 8, 1801, the 1785 enactment requiring writs of summons to be in the language of the defendant was repealed.²³¹ This repeal became the subject of litigation in

the case of *R. v. Talon*²³² where the defendant argued that by abolishing the requirement that the writ of summons be in the language of the defendants, the legislature had meant that writs should be issued in English, the language of the Crown, and that consequently the French writs served on them were invalid. This argument was rejected by Mr. Justice Reid of the Court of King's Bench.

3. *Bilingualism in Upper Canada*

1.93. From the beginning the population of Upper Canada was predominantly English-speaking. By the terms of the Constitutional Act of 1791 the laws in force at the time of the division of the province of Quebec into Upper and Lower Canada were to remain until changed by the legislatures of the new provinces, each province to act independently of the other. The legislature of Upper Canada first met at Newark (now Niagara-on-the-Lake) on September 17, 1792. On October 15, 1792 it abrogated for Upper Canada section 8 of the Quebec Act providing for resort to French law in matters of property and civil rights.²³³ Section 3 of this Act of repeal provided that the laws of England would apply in matters of property and civil rights, and section 5 introduced the laws of evidence of England. In the same year jury trials were established and it was provided that jurors should be selected according to the laws and custom of England.²³⁴ The status of juries in England at the time will be discussed in Chapter V. Suffice it to say that English law at the time did not allow for trial by a jury of one's own language when that language was not English, but did permit aliens the right of trial by a jury *de medietate linguae*, half of whose members could be aliens. We shall see, however, that the right to be tried by aliens did not include the right to demand that the aliens be of one's own language.²³⁵ Since French-speaking Canadians were not aliens it is questionable that they could have demanded to be tried in Upper Canada by a jury, half of whom were French-speaking Canadians. We have been unable to find any reported decision on the point.

On July 9, 1794, the legislature of Upper Canada established a Court of King's Bench for Upper Canada which was to have the jurisdiction and powers of similar courts in England.²³⁶ Section 9 of this Act made some provision for bilingualism in the administration of justice by requiring notices attached to processes served on Canadian defendants to be written in the French language. The words of this section were as follows:

... upon every copy of such process, to be served upon any defendant, shall be written a notice in the English tongue, to such defendant of the intent and meaning of such service to the effect following:

"A.B. You are served with this process, to the intent that you may, either in person or by your attorney, appear in his Majesty's court of King's Bench, at the return thereof, being the _____ day of _____ in order to defence in this action."

And when any party, defendant, is a Canadian subject by treaty, or the son or daughter of such Canadian subject, the like notice shall be written in the French language.

"A.B. Il vous est enjoint et ordonné de comparôître personnellement ou par procureur à la cour du banc du roy à l'expiration de ce writ qui sera le _____ jour _____ pour répondre à cette action."

Despite a diligent search, this was the only express recognition of bilingualism which we could find in the laws of Upper Canada. All statutes were passed and published in the English language only. It is true that section 33 of the Constitutional Act did not abrogate those laws of the province of Quebec which had provided for the use of French in the administration of justice, nor was there ever an express repeal of these laws by the legislature of Upper Canada. However, by sections 3 and 5 of the Upper Canada Act,²³⁷ the laws of England were to be the rule of decision in matters of controversy relative to property and civil rights, and all matters relative to testimony and legal proof were to be regulated by English rules of evidence. The combined effect of these provisions may have been to abrogate the use of the French language in the courts unless otherwise provided and to extend to Upper Canada the application of the Act of the British Parliament,²³⁸ which had made English the only lawful language of proceedings in English courts. It is thus very difficult to conclude that at any time French was an official language of Upper Canada.

1.94. On June 3, 1793 the Legislative Assembly of Upper Canada passed the following resolution: "That such acts as have already passed or may hereafter pass the Legislature of this Province, be translated into the French language for the benefit of the inhabitants of the Western District of this Province and other French settlers who may come to reside within this Province, and that A. Macdonell, Esquire, Clerk of this House, be likewise employed as a French Translator for this and other purposes of this House."²³⁹ It should be noted, however, that the foregoing resolution in no way established official bilingualism in Upper Canada, although it did manifest a respect for the language of the French-speaking citizens of that province. We have not been able to find any French versions of the statutes of Upper Canada, nor do we know of any provision regulating the distribution of such translated texts to the French-speaking inhabitants.²⁴⁰ It must also be remembered that the French texts of Upper Canada statutes did not have legal authority, for the Acts of the provincial legislature were passed in the English language only.

1.95. The Constitutional Act of 1791 failed to demarcate clearly the respective legislative powers belonging to the British and provincial Parliaments. Also it established an executive which bore no responsibility to the Legislative Assembly. Both provincial assemblies insisted on controlling finances, and both provinces quarrelled over the division of tariffs. These factors, among others, induced some to favour a reunion of Upper and Lower Canada into a single province. The British ministers, in particular, favoured reunion, for they were tired of the discord and complaints in Canada. The governing class in the colony also favoured the measure, for it saw its privileged position menaced by the increasing power of the assemblies. Finally, the Montreal merchants supported reunion because they wished to re-establish the commercial unity of the St. Lawrence Valley system.

In 1822 a Bill for Uniting the Legislatures of the Provinces of Lower and Upper Canada was introduced.²⁴¹ The preamble read: "Whereas in the present situation of the Provinces of Lower and Upper Canada, as such with relating to Great Britain as to each other, a joint Legislature for both the said Provinces would be more likely to promote their general security and prosperity than a separate Legislature for each of the said Provinces, as at present by law established; . . ." Since the first session of the Legislative

Assembly of Lower Canada, the conflict between French and English in the Assembly, and the merchants' contempt for the non-commercial interests of the French Canadians, had led to considerable anti-French feelings. Hence the proposed act of union contained a provision for the abolition of the French language in the Parliament to be created by the terms of the act. As a result of strong French-Canadian opposition and Upper Canadian reservations, the bill was withdrawn. No subsequent attempt was made to submerge the use of the French language in the government of Canada until the Act of Union of 1840, an attempt short-lived in its success.

On February 10, 1838, as a result of the disturbances in Canada, the imperial Parliament suspended the Constitutional Act of 1791. Provision was made for a special council to govern Lower Canada in place of the Legislative Assembly of that province. However, the Legislative Assembly of Upper Canada was not disbanded, and on March 27, 1839, it passed a resolution whereby English was to be the only language in use in the debates of the legislature, before the courts of justice, and in all public documents.²⁴² Thus, by the time of the Act of Union, English was the sole official language of Upper Canada.

1.96. In the act establishing the Special Council²⁴³ nothing was said about the number or the qualifications of its members, who were duly appointed and convened. On Wednesday, April 18, 1838 it adopted its rules and orders.²⁴⁴ These were silent on the language of the proceedings, possibly because all the members were English-speaking. Every ordinance passed by the Council was in English, although all ordinances were printed in both languages in separate volumes.²⁴⁵ No change took place, however, in the procedure of the courts.

4. *Lord Durham's Report*

1.97. In 1838 the Earl of Durham was appointed High Commissioner and Governor General of all His Majesty's possessions in British North America. He was instructed to investigate the sources of the discord in Canada and to suggest a remedy. His commission further ordered him: "To inquire into as far as may be possible to adjust all questions depending in the said provinces of Lower and Upper Canada, or either of them, respecting the form and administration of the Civil Government thereof respectively."²⁴⁶ Durham arrived in Canada on May 27, 1838. He dissolved the special council and formed one with his own appointees to replace those of Sir John Colborne. He did not align himself with the British Tory elements, but sought the knowledge and advice of all the leading Canadians, both English- and French-speaking. The fruit of his five earnest months in Canada was the famous *Report on the Affairs of British North America*,²⁴⁷ in which he advocated the introduction of responsible government to make the executive responsible to the legislature.

Durham saw two primary causes for the troubles besetting Canada. These were the racial cleavage between the two ethnic groups and the antagonism between the popular and executive branches of the government. The first cause was rendered even more disrupting by the difference of language. On this matter Durham spoke as follows:

The difference of language produces misconceptions yet more fatal even than those which it occasions with respect to opinions; it aggravates the national animosities,

by representing all the events of the day in utterly different lights. The political misrepresentation of facts is one of the incidents of a free press in every free country; but in nations in which all speak the same language, those who receive a misrepresentation from one side, have generally some means of learning the truth from the other. In Lower Canada, however, where the French and English papers represent adverse opinions, and where no large portion of the community can read both languages with ease, those who receive the misrepresentation are rarely able to avail themselves of the means of correction. It is difficult to conceive the perversity with which misrepresentations are habitually made, and the gross delusions which find currency among the people; they thus live in a world of misconceptions, in which each party is set against the other not only by diversity of feelings and opinions, but by an actual belief in an utterly different set of facts.

According to Durham the racial and linguistic differences had been perpetuated by British colonial policy:

A jealousy between two races, so long habituated to regard each other with hereditary enmity, and so differing in habits, in language and in laws, would have been inevitable under any form of government. That liberal institutions and a prudent policy might have changed the character of the struggle I have no doubt; but they could not have prevented it; they could only have softened its character, and brought it more speedily a more decisive and peaceful conclusion. Unhappily, however, the system of government pursued in Lower Canada has been based on the policy of perpetuating that very separation of the races, and encouraging these very notions of conflicting nationalities which it ought to have been the first and chief care of Government to check and extinguish. From the period of the conquest to the present time, the conduct of the Government has aggravated the evil, and the origin of the present extreme disorder may be found in the institutions by which the character of the colony was determined.²⁴⁹

Race was the fundamental cause of difficulty:

The struggle between the Government and the Assembly, has aggravated the animosities of race; and the animosities of race have rendered the political difference irreconcilable. No remedy can be efficient that does not operate upon both evils. — At the root of the disorders of Lower Canada, lies the conflict of the two races, which compose its population; until this is settled, no good government is practicable; — for whether the political institutions be reformed or left unchanged, whether the powers of the Government be entrusted to the majority or the minority, we may rest assured, that while the hostility of the races continues, whichever of them is entrusted with power, will use it for partial purposes.²⁵⁰

Durham saw only one solution to the problem. The French Canadians had to be anglicized. Almost eight decades after the cession, Lower Canada was to become British in fact as well as in law:

The fatal feud of origin, which is the cause of the most extensive mischief, would be aggravated at the present moment by any change, which should give the majority more power than they have hitherto possessed. A plan by which it is proposed to ensure the tranquil government of Lower Canada, must include in itself the means of putting an end to the agitation of national disputes in the legislature, by settling, at once and for ever, the national character of the Province. I entertain no doubts as to the national character which must be given to Lower Canada; it must be that of the British Empire; that of the majority of the population of British America; that of the great race which must, in the lapse of no long period of time, be predomi-

nant over the whole North American Continent. Without effecting the change so rapidly or so roughly as to shock the feelings and trample on the welfare of the existing generation, it must henceforth be the first and steady purpose of the British Government to establish an English population, with English laws and language, in this Province, and to trust its government to none but a decidedly English Legislature.²⁵¹

A legislative union of the two provinces was to be the means of assimilating the French Canadians. Durham had earlier favoured a federal union, for he thought that a federation would tend gradually to become a complete legislative union, and that thus, while conciliating the French of Lower Canada by leaving them the government of their own province and their own internal legislation, he might provide for the protection of British interests by the general government, and for the gradual transition of the provinces into a united and homogeneous community.²⁵² However, he now reached the conclusion that it was too late for Lower Canada to undergo a period of transition. No French-Canadian assembly would work in harmony with a central federal government, and peace could be restored only by subjecting Lower Canada to the vigorous rule of an English majority. The only effective means of achieving this state of affairs was a legislative union.²⁵³

Durham believed that the anglicization of the French would be achieved through the sheer force of numbers. He offered some statistics to prove that in a united Canada the British of Upper Canada being 400,000 in number and reinforced by the 150,000 British of Lower Canada, would have a majority of 100,000 over the French. He, therefore, concluded that there would always be an Anglophone majority in the united Parliament. In fact, he overestimated the British population. However, he rightly predicted that immigration would soon redress any balance adverse to his overall plan. As had happened in Louisiana, Durham hoped that the French would realize that they were outvoted. He believed that they would recognize the futility of any attempt at opposition, and would acquiesce in their new state of political existence.²⁵⁴

Events proved less than a decade later that Durham was wrong in his plan for anglicization. As Gillis has said, "Cultural assimilation did not, and could not, have a remote chance of success in Canada as late as 1839. After eighty years of growth and consolidation under British rule, nothing but brute force could bring about such a change among the French. The experience of the Acadians in 1755 had given a tragic proof that even then the French were too strongly attached to their ancient heritage to accept the proffered substitute of Britain."²⁵⁵

D. Period of the Act of Union, 1840-67

1. Unilingualism in the united legislature

1.98. In 1840, as a result of Durham's recommendations, the Act of Union²⁵⁶ reunited Lower and Upper Canada. Unilingualism in the new united legislature was consecrated by section 41:

... from and after the said Re-union of the said Two Provinces all Writs, Proclamations, Instruments for summoning and calling together the Legislative Council and

Legislative Assembly of the Province of Canada, and for proroguing and dissolving the same, and all Writs of Summons and Election, and all Writs and public Instruments whatsoever relating to the said Legislative Council and Legislative Assembly, or either of them, and all Returns to such Writs and Instruments, and all Journals, Entries, and written or printed Proceedings, of what Nature soever, of the said Legislative Council and Legislative Assembly, and of each of them respectively, and all written or printed Proceedings and Reports of Committees of the said Legislative Council and Legislative Assembly respectively, shall be in the English Language only: Provided always, that this Enactment shall not be construed to prevent translated Copies of any such Documents being made, but no such Copy shall be kept among the Records of the Legislative Council or Legislative Assembly, or be deemed in any Case to have the Force of an original Record.

While the status of French in the courts was left unaffected, section 41 was obviously designed to implement the policy of anglicization recommended by Durham. It marked the first deliberate attempt ever made by the British Parliament to suppress the French language. However, the section did imply that in the eyes of the British Parliament the French language had not until that time been abrogated and that in fact it had held some status alongside English.

1.99. The legislature of Canada soon took steps to offset the effects of section 41. On September 18, 1841, on the proposal of Étienne Parent, it adopted a law providing for the translation into French of all statutes of the Canadian legislature and of all relevant imperial laws including the Act of Union.²⁵⁷ Article 29 of the rules and regulations adopted by the Legislative Assembly in 1841 provided for bilingual copies of the journal of the Assembly for the use of the members.²⁵⁸ Moreover, article 37 of the rules required that every motion made in the Assembly be read in both languages by the Speaker before being debated. Article 50 required that all public bills be introduced by motion. While article 50 made no mention of language, article 37 had already ensured that motions introducing public bills would have to be in both languages. Article 66 required a bilingual notice prior to the introduction of any private bill. Apart from this provision, there is no other mention of language requirements in connection with private bills. On the other hand, the rules and regulations of the Legislative Council at this time contained no reference to language.

Further evidence of the bilingual publication and distribution of statutes is to be found in an Act to provide for the Summary Trial of Small Causes in Lower Canada,²⁵⁹ article 41 of which provided that the commissioners appointed under the Act should receive a printed copy of it in each language.

1.100. On March 16, 1842, in compliance with an address by the Legislative Assembly to the Governor, three commissioners were appointed by the latter:

to revise and examine the several statutes and ordinances from time to time passed, enacted and ordained in that part of the Province of Canada formerly called Lower Canada, and now in force and effect, and to consolidate such of the said statutes and ordinances as relate to the same subject or can be advantageously consolidated, and thereupon to make such report as in their judgment should be most for the interest, welfare and good government of the said Province. . . .

The commissioners made two progress reports to the Legislative Assembly by way of message from the Governor General on December 7, 1843.²⁶⁰ The second report is of

particular interest because it made reference to the French and English versions of the revision. The English version was finished earlier. As the commissioners said, "The English version has been completed and before the public for nearly two months; the French version, which has been prepared by Mr. G.B. Faribault, advocate, under the superintendence of the commissioners, is now also completed and published."²⁶¹

More important, the second report recommended the preparation of an English version of the civil laws of Lower Canada for the benefit of the English-speaking inhabitants. The commissioners also suggested that English law be made comprehensible to the French-speaking population by means of translation:

If to the publication in question there could be added a reprint of such parts of the custom of Paris as are still in force in Lower Canada, with an English version sufficiently clear to make the provisions of the custom intelligible to those acquainted with the French language, the value of the work would be considerably enhanced; . . . It seems very desirable that some means should be adopted for making the civil law of Lower Canada accessible to the English portion of the population. It is not within the province of the commissioners to discuss the best means of doing this, or to enter upon the subject of codification; but they have been induced to make this suggestion from their conviction, that the prejudice entertained by many to the civil law of Lower Canada, arises solely from their want of the means of obtaining that general knowledge of its provisions, which it is desirable to place within the reach of every man with regard to the law by which he is bound, but which, under existing circumstances, it is impossible for any inhabitant of Lower Canada to acquire, unless he be intimately acquainted with the French language. The same difficulty exists for those unacquainted with the English language. That difficulty has in a great measure been removed by the excellent and comprehensive consolidation of a very considerable and most important portion of that law, contained in the statutes of the first session of the parliament of Canada; but other parts of the English law are in force in Lower Canada; and it is still true, that two systems of law exist there, each of which, by reason of the language in which it is written, is inaccessible to a large portion of the people whom it binds.²⁶²

In a report by two of the commissioners, Buchanan and Wicksteed, on July 1, 1845, a statement is made as to the progress of the French version of the revision which, *en passant*, throws some light on the diligence with which the bilingual publication of statutes was carried out:

Before the commencement of the session in November, 1844, the text of the English version had been completed, with a brief index, copies had been distributed to the Judges and other public officers to whom they were especially requisite, and the printing of the French version was advanced to about four hundred pages. As it was found impossible to complete the general index before the commencement of the session, or early during its progress, it was thought better to defer it until the close, when the acts passed and their effect would be known. The printing of the French version was continued and is now nearly completed; but the great press of work thrown upon the Queen's Printer in printing the acts of last session, amounting to upwards of six hundred pages in each language, has necessarily somewhat retarded the Revised Statutes.²⁶³

1.101. Section 3 of an Act to provide for the distribution of the Printed Copies of the Laws²⁶⁴ provided that the Queen's Printer should make available as soon as possible after

each session (or even earlier) printed versions of all bills in both languages to all members of each house and to designated government officials.²⁶⁵ At least two other statutes of the Parliament of the united province of Canada provided for publication and distribution of statutes in the two languages.²⁶⁶

2. Reestablishment of bilingualism

1.102. Section 41 of the Act of Union was repealed by the United Kingdom Parliament in 1848, but not before the French-speaking members in the Legislative Assembly of Canada had waged an intense and continuing battle for its removal. One of the leaders in the struggle for the return to bilingualism in the Canadian legislature was Louis-Hippolyte La Fontaine. First defeated in a Lower Canadian riding, he ran and was elected in an English-speaking Toronto riding. On September 13, 1842, he rose in the Assembly and proceeded to deliver his maiden speech in French. A minister from Upper Canada objected and demanded that he speak in English. La Fontaine replied eloquently:

They are asking me to deliver my first speech in this House in a language not my mother tongue. I do not have confidence in my ability to speak English. But I must inform the honourable members that even if I knew English as well as I know French, I would still make my first speech in the language of my French Canadian compatriots—if it were only to protest formally against the cruel injustice of the Act of Union which proscribes the mother tongue of half the population of Canada. I owe it to my compatriots; I owe it to myself.²⁶⁷

In 1844 Gauchon and Gauvreau insisted that the Speaker of the Assembly be bilingual. The French Canadian members rallied behind this demand, and Allan McNab defeated Morin for the Speakership by only three votes.²⁶⁸

On February 17, 1845 Laurin presented a motion in the French language, which Mr. McNab refused to allow. La Fontaine, Marin, and other French-speaking members protested strongly, and the Speaker was upheld on this point by only a small majority.²⁶⁹

In 1844 the Conservative Draper-Viger government was elected, but by only a narrow majority, a factor which induced the coalition to favour a policy of concessions to the French in order to be assured of more votes. On December 20, 1844 Denis Benjamin Papineau moved, and George Moffat seconded, that an address be transmitted to the Queen requesting the repeal of section 41 of the Act of Union and the re-establishment of bilingualism in the legislature of Canada. This resolution was adopted on January 31, 1845 and the draft address originally submitted on December 20 was unanimously accepted by the Assembly on February 21, 1845. The Legislative Council concurred on February 26, 1845, and on March 4, 1845, the Governor General, Lord Metcalfe, acceding to the pressures from the government, agreed to transmit the address to the British Secretary of State for delivery to the Queen.

The Queen transmitted her assent to the new address on February 3, 1846 via a letter addressed to the new Governor General, Lord Cathcart, from the Secretary of State, William Ewart Gladstone. On August 14, 1848 the Queen assented to a special enactment of the Imperial Parliament²⁷⁰ which had the effect of revoking section 41 of the Act of Union and allowing the legislature of Canada to make such regulations as it deemed

advisable concerning the use of language. In consequence, there was no longer any obstacle to restoring the French language to its former position and the path was thus clear for French to regain its former status as a national language.

At the opening of the session of the legislature of Canada on January 8, 1849, the Governor General, Lord Elgin, informed the legislature of the passage of the Union Amendment Act by the British Parliament. To confirm the import of this amendment to the constitution of Canada, he read the Speech from the Throne in both English and French. This was the first time since 1792 that the representative of the monarch in Canada had read the Throne Speech in French. Until then the governors had read it in the English language only, and had permitted the Speaker of the Legislative Council to read a French translation.²⁷¹ By this gesture bilingualism was for the first time officially recognized by the representative of the sovereign, thus inaugurating a parliamentary practice that persists to this day.

Furthermore, French Canadians gained equal representation in the cabinet of the united provinces.²⁷² More important, from the time of the session of 1849 until Confederation it can be said with certainty that the official texts of all laws passed by the legislature of Canada were in both languages, thus making the French texts as valid as the English. The original records of these statutes survive to confirm this fact which has been overlooked by most commentators on the language question. Thus *official bilingualism existed in Canada at least 18 years before the passage of the British North America Act, 1867*.

1.103. A consolidation of the various electoral statutes relating to the Legislative Assembly of the province of Canada²⁷³ provided for the use of interpreters when a prospective elector did not understand English or French:

... whenever any Elector shall not understand the *English language* or the *French language*, or shall understand *neither of the said languages*, it shall be lawful for any Deputy Returning Officer to make use of an Interpreter to translate any Oath or Affirmation which shall be required of such Elector, as well as the questions which shall be put to him and his answers; and such Interpreter shall take before the said Deputy Returning Officer the Oath, or if he be one of the persons permitted by law to affirm in civil cases, the Affirmation following:

"I swear (*or affirm*) that I will faithfully translate such oaths, declarations, affirmations, questions and answers as the Deputy Returning Officer shall require me to translate at this Election. So help me God."²⁷⁴

This provision was repeated practically verbatim in section 57 of the 1859 Act respecting Elections of Members of the Legislature.²⁷⁵

3. *Printing and distribution of bilingual statutes*

In the Rules and Standing Orders of the Legislative Assembly of Canada, as published in 1854, there were several provisions which made the use of both languages mandatory. Rule 36 provided that all motions and questions should be put in English and in French: "... When a motion is seconded it should be read in English and in French by the Speaker, if he is master of both languages; if not, the Speaker shall read in either of the two languages most familiar to him, and the reading of the other language shall be at the

table by the Clerk or his Deputy, before debate.” Rule 5 required that all bills be printed before the second reading in both languages, except for bills relating only to Upper Canada, though members were free to request French versions of the latter. Rule 61 required the Clerk of the Assembly to publish Rules 62, 63, and 64 in the *Canada Gazette* within three months after the close of the session. These rules required that notice of private bills in Lower Canada be in English and French.

Standing Order VIII of the Assembly stipulated the bilingual publication of all bills and documents unless otherwise directed.

In the Constitution, Rules and Regulations of the Legislative Assembly of Canada, published in 1861, with English and French texts in the same volume on opposite pages, there are further provisions for bilingualism in the Canadian legislature. Rule 33 was substantially the same as Rule 36 of the earlier version of the Rules and Standing Orders. Rule 50 required the clerk of the Assembly to publish the rules related to private bills in the *Canada Gazette*, and the résumé of these rules in English and French newspapers. Rule 51 required notice of private bills to be bilingual. Rule 58 made detailed provision for the publication and distribution by petitioners of private bills in both languages.

Although the rules of 1861 made no mention of bilingualism in public bills, Rule 39 required every bill to be presented on motion, and Rule 33 required every motion to be bilingual.

1.104. We have noted the various provisions adopted to provide for the printing and distribution of statutes in both languages. Attention should also be drawn to the fact that a number of subsequent statutes were enacted to ensure similar aims.²⁷⁶

1.105. The general rule was that statutes relating to Upper Canada be published in English only, but translations were allowed at the discretion of the Governor. This in effect continued the practice which had existed from the time of the creation of the province of Upper Canada, even though on June 3, 1793, the legislature of Upper Canada had passed a resolution which apparently required that all acts be translated into the French language.²⁷⁷ However, section 17 of an Act respecting the Consolidated Statutes for Upper Canada²⁷⁸ provided as follows: “It shall not be necessary that the said Consolidated Statutes for Upper Canada be translated into French, but the Governor may, in his discretion, cause a translation to be made and printed at any time thereafter.”

We inquired from the Ontario department of Public Records and Archives whether any French versions of the statutes of Upper Canada were ever printed. On November 1, 1965 Mr. D.F. McOuat, Archivist of Ontario, replied as follows:

In reply I should state that we have never seen official copies of the Statutes or Proceedings of the Legislative Assembly of Upper Canada printed in the French language. I have noted your reference to a resolution passed by the Legislative Assembly on 3 June 1793 but I have been unable to find what action was taken subsequently. Presumably, before any expenditure was authorized, the project would have to be approved by the Legislative Council and the Lieutenant-Governor.

I gather that lieutenant-governors' special proclamations were, under certain circumstances, sometimes printed in French. For example, Tremaine's *Bibliography of Canadian Imprints 1751-1800* lists, on page 438, a broadsheet proclamation in French by Simcoe regarding the sale of liquor to the Indians. This would be logical no doubt in reference to traders operating out of the Detroit area.

1.106. On June 10, 1857 the Parliament of Canada, acting in accordance with the recommendation contained in the second progress report of the Commissioners for the Revision of 1845, passed an Act to provide for the Codification of the Laws of Lower Canada relative to Civil Matters and Procedure.²⁷⁹ The preamble to this Act indicated that a primary purpose of the codification was to make available the private law of Lower Canada to both segments of the population in the language in which each could understand it:

WHEREAS the Laws of Lower Canada in Civil Matters, are mainly those which at the time of the cession of the country to the British Crown, were in force in that part of France then governed by the Custom of Paris, modified by Provincial Statutes, or by the introduction of portions of the Law of England in peculiar cases; and it therefore happens, that the great body of the Laws in that division of the Province, exist only in a language which is not the mother tongue of the inhabitants thereof of British origin, while other portions are not to be found in the mother tongue of those of French origin; And whereas the Laws and Customs in force in France at the period above mentioned, have there been altered and reduced to one general Code, so that the old laws still in force in Lower Canada are no longer re-printed or commented upon in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them; . . .

Article 1 provided for three commissioners and two secretaries who were to be barristers and, respectively, French- and English-speaking. Article 15 required that the codes be printed in both languages and that the two texts stand side by side. Thus was inaugurated the practice of printing the laws of Quebec with English and French versions opposite each other on the same page, a practice which continues to this day. Prior to that time the English and French versions of the laws had appeared in separate volumes.

Although the statute was passed in June 1857, it was not acted upon for more than a year and a half. Commissioners were appointed in 1859. They drafted eight reports in all on the Civil Code and terminated their work on November 25, 1864. On January 31, 1865 a bill was introduced to adopt the new Code and on March 8, 1865 it was adopted. Under the provisions of the Act, the Governor issued a proclamation fixing August 1, 1866 as the date on which the Civil Code should come into force.

McCord, one of the secretaries to the commissioners, concluded his preface to the first edition of the Code by writing:

The English speaking residents of Lower Canada may now enjoy the satisfaction of at last possessing in their own language the laws by which they are governed, and the Province of Quebec will bring with her into confederation a system of laws of which she may be justly proud, a system mainly founded on the steadfast, time-honored and equitable principles of the civil law, and which not only merits admiration and respect, but presents a worthy model for legislation elsewhere.²⁸⁰

4. *Bilingualism in administration of justice*

1.107. Under the Act of Union the organization of the courts increased in complexity, and there were further legislative provisions for bilingualism in the courts of Lower Canada. All laws concerning the administration of justice which existed in each province at the time of union, remained in force. Thus, while the French language lost its status in

the legislature, it retained it in the courts. In section 12 of an Act to provide for the more easy and expeditious administration of Justice . . . in Lower Canada,²⁸¹ it was provided that summonses should be served in the same manner as those issued by the superior courts of civil jurisdiction in Lower Canada. The significance of the phrase "in the same manner" is that summonses could thus be served in either language according to the law of the land, notwithstanding the repeal in 1801 of the Ordinance of 1785 which had required that summonses be served in the language of the defendant. The decision of Mr. Justice Reid of the Court of King's Bench in the case of *R. v. Talon* bears out the latter contention.²⁸²

In 1843 the legislature of Canada passed an act which provided expressly that all writs and processes issued by any Court of Queen's Bench should be in both English and French.²⁸³ This made for a stricter bilingualism than before, since in the past the parties had had the option of choosing either language. Section 54 of the same act provided that the notice to appear should be published twice in an English newspaper and twice in a French newspaper where personal service of the defendant was not possible. In 1843, it was provided that all writs and processes issued by the Court of Appeals should also be in both languages.²⁸⁴

On June 9, 1846 the various provisions which made it compulsory to issue writs and processes from the Court of Queen's Bench and the Court of Appeals in both languages were abrogated and the general rule was laid down that all writs and processes emanating from any court in Lower Canada should be in either language at the option of the parties.²⁸⁵ This is still the rule today in Quebec. Parties may thus plead in either language and reply to pleadings in the language of their choice. They can even switch from one language to another in the midst of a case. This rule is also embodied in section 133 of the British North America Act as far as federal and Quebec courts are concerned.

In 1849 the right of parties to resort to either French or English in all writs and processes in the Court of Appeal was reaffirmed by statute.²⁸⁶ The same right to use French or English in the Superior Court and Circuit Court was similarly reaffirmed in another statute of 1849.²⁸⁷ Under this Act absent defendants were again to be summoned through the newspapers in both languages,²⁸⁸ official translators were to be provided in the courts,²⁸⁹ and all prospective bailiffs of the Superior Court were required to be able to write either French or English.²⁹⁰ In 1855 this last requirement was extended to cover all bailiffs.²⁹¹ Finally an Act to incorporate the Bar of Lower Canada²⁹² stipulated that no one could be admitted to the Bar of Lower Canada without knowing either English or French.

1.108. During this period, the position of mixed juries was clarified in Lower Canada. In 1847, the right of aliens to participate in juries *de medietate linguae* was affirmed.²⁹³ Two years later a statute set out detailed provisions for mixed jury trials in civil as well as criminal cases in the districts of Quebec and Montreal.²⁹⁴ This act was important because, while the right to a mixed jury had existed since 1787, it had been subverted by abuses in the selection procedures. Lord Durham reported that "the most serious mischief in the administration of criminal justice, arises from the entire perversion of the institution of juries, by the political and national prejudices of the people."²⁹⁵ He described at length the ill effects of these abuses and the possibility of injustices through the packing

of juries.²⁹⁶ The need was therefore very great for a regulated system of jury selection. The new act attempted to provide this. It required in criminal cases a strict equality in the summoning of English and French jurors in the Quebec and Montreal districts: half the panel should be Francophones and the other Anglophones, at least in the cities of Montreal and Quebec. The parties could consent to unilingual juries or the accused could require at the very least a jury composed of persons half of whom spoke his language.²⁹⁷

The right to a mixed jury in civil cases was also regulated. It was not confined to the districts of Quebec and Montreal, as it apparently was in criminal cases.²⁹⁸ These provisions were repeated unchanged in an Act respecting the selecting and summoning of Jurors.²⁹⁹

1.109. In 1864, the provincial legislature passed an Act respecting Jurors and Juries.³⁰⁰ This act, also known as the Canada Jury Act, stipulated that in the Quebec and Montreal districts, equal numbers of jurors were to be summoned from each linguistic group, adding that this provision could be extended to other districts upon the application of the grand jurors. The linguistic qualification of all prospective jurors was to be noted opposite their name. The right of an accused to demand that at least one half of the jury be composed of persons speaking his own language was recognized. In murder cases the accused could demand that the jury be composed *entirely* of persons speaking his own language. The act also contained detailed provision for making up deficiencies in the required number of French or English jurors.

The importance of these provisions recognizing the right to a mixed jury in criminal cases lies in the fact that they form, even today, the basis in Quebec of the right to a mixed jury. Indeed, section 535 of the Criminal Code of Canada does not directly confer on persons accused in Quebec the right to demand a mixed jury. This right is derived from the Canada Jury Act of 1864, which was carried into the law of Quebec by the terms of section 129 of the B.N.A. Act.³⁰¹ Since the passage of the B.N.A. Act, the right to a mixed jury in Quebec can be abrogated only by the Parliament of Canada because it is a matter falling within criminal procedure, a subject assigned to the exclusive jurisdiction of Parliament by the terms of section 91(27) of the Act.³⁰²

Section 9 of the Canada Jury Act of 1864³⁰³ established conditions for the choosing of juries in civil cases: "If the parties to such suit be of different origins, and if any of them demand a jury de medietate linguae, the Court or Judge shall order that the jurors, summoned for such trial, shall be composed in equal numbers of persons speaking the English language and of persons speaking the French language; . . ."

The conditions for the selection of a unilingual jury were laid down as follows:

If the parties to any cause be all either of French or of English origin, or if, being of different origins, the demand of any of them to that effect be unopposed, the Court or any Judge thereof may order that the jurors to be summoned to try any issue in such suit, shall be composed exclusively of persons speaking the English language, or of persons speaking the French language, according to the language of the parties, or according to the demand, as the case may be; . . .

These provisions of the Canada Jury Act, regarding mixed juries in civil cases, have been carried (with modifications) into articles 338 and 339 of the Quebec Code of Civil Procedure.³⁰⁴

1.110. This period also witnessed an increase in the number of legislative provisions regarding bilingual notices and advertisements from courts and judicial officers. Most of such communications advertised unclaimed goods or protected creditors' rights. There was also a proliferation of bilingual notices required from public commissioners, public and private corporations, and private individuals. Virtually all of these sought to protect property rights. Notices of election to the Legislative Assembly of Canada were also required by law to be in both languages.³⁰⁵

E. Confederation, 1867

1. Quebec Resolutions

1.111. Section 46 of the Quebec Resolutions of 1864 (repeated identically in resolution 45 of the London Resolutions of 1866) provided as follows for the protection of the French language: "Both the English and French Languages may be employed in the General Parliament and in its proceedings, and in the Local Legislature of Lower Canada, and also in the Federal Courts and in the Courts of Lower Canada."³⁰⁶

The resolution had been proposed on October 26, 1864, by Alexander T. Galt and adopted unanimously. Two factors must be borne in mind in a consideration of this resolution. Firstly, only three out of the 30 delegates at the Quebec Conference were French Canadians. Secondly, the resolution was permissive and not mandatory in its expression. It did not impose any *obligation* to use the French language in the federal Parliament or courts; similarly, it was not obligatory that English be used in the legislature or courts of Lower Canada.

1.112. The resolution was debated in the third session of the eighth provincial Parliament of Canada, and a perusal of the speeches indicates how the language guarantee came to be more stringent in its ultimate expression in section 133 of the B.N.A. Act than it had been in the Quebec and London resolutions. On Wednesday, March 8, 1865 Félix Geoffrion (Verchères) made the following observations on resolution 46:

A close examination of this resolution shews at once that it does not declare that the French language is to be on the same footing as the English language in the Federal and Local Legislatures; in place of the word "shall," which ought to have been inserted in the resolution, the word used is "may," so that if the British majority decide that the *Votes and Proceedings* and Bills of the House shall be printed only in English, nothing can prevent the enactment taking effect. Of course we shall be allowed to use the French language in debate, but on the other hand, it is evident that the majority may, whenever they choose, enact that the bills and proceedings of the House shall not be printed in French, and consequently the clause affords no security whatever to us French-Canadians . . . ³⁰⁷

The Lower Canada members who have always supported the Ministry ought to urge them to insert a clause in the resolutions declaring that the French language shall be on the same footing as the English language; the guarantee afforded us by the resolutions, as they now stand, amounts to nothing. . . . we French-Canadian members are bound to see that the resolutions . . . are not written in such a way as to be susceptible of two interpretations . . . ³⁰⁸

I trust that the Lower Canada members will not shirk their duty, and that they will insist on the Government declaring, in their resolutions, that all these things we hold so dear shall be protected from the attacks of our adversaries. Every danger of false interpretation ought to be removed from these resolutions. If, as it is stated, our language is to be fully protected under the new system, I do not see why it is not so stated clearly in the Constitution.³⁰⁹

The Solicitor General, Hector Langevin, replied to Geoffrion in the following words:

... I am quite sure the honourable member for Verchères will be delighted to learn that it was perfectly well understood at the Conference of Quebec that the French language should not only be spoken in the courts of justice, in the Federal Parliament and in the Legislature of Lower Canada, but that, precisely as is now the case, the *Votes and Proceedings* of the Legislature as well as all the Federal laws and those of the Legislature of Lower Canada, should be printed in both languages. And what is still more, under Confederation the French language will be spoken before the Federal tribunals, an advantage which we do not possess at present when we apply to the Court of Appeals of Great Britain. ... These are the principles upon which the new Constitution will be based, and I feel justified in going so far as to say that it was impossible to secure more effectually this essential privilege of our nationality, and at the same time our civil and religious institutions.³¹⁰

Geoffrion could not be placated, however, and addressed the Assembly in rebuttal:

... I cannot bring myself, like the honourable member, to see the splendid protection he vaunts so highly. ... It will always be optional with the British majority to avail themselves of the letter of the Constitution, and they may at any time say to us: "You cannot have it, we oppose it, and the Constitution does not confer on you the rights you claim under it. ..."

We French-Canadian members, I repeat it, ought to insist that the word "shall" be substituted for the word "may" in the resolution relating to this matter, with reference to the publication of the proceedings of the Legislature. If this is not done, and if we do not take every possible precaution, sooner or later the English speaking majority in the Federal Legislature will unite against us on this point, and enact that the laws shall be printed in the English language only.³¹¹

Geoffrion concluded his address with the following words: "If we vote these resolutions as they are, we shall vote without knowing exactly the nature of the guarantees they afford us."³¹²

Édouard Rémillard entered the debate and made the following remarks:

Mention is also made of the use of the French language; it is said that it cannot be used in the Federal Parliament. But, for my part, I am of the opinion that if the scheme is adopted, the French language will be more used and will be held in higher estimation in the Federal Parliament, than it has been in this Legislature for some years. It is feared that the laws, the documents and the proceedings of the Federal Parliament are not to be printed in the French language.³¹³

He then continued:

... if the use of the French language can be excluded, so also may the use of English language be excluded, for both are on an equal footing. Because it is not stated that the laws and proceedings of the Federal Parliament shall be printed in the French language, the conclusion is drawn that they will be so in English; but the same might be said of the English language, as it is not stated that they will be

printed in that language . . . in that case the members from Lower Canada might be compelled to speak French; but are the Upper Canadian members also to be forced to speak that language, they who do not understand a word of it?³¹⁴

With reference to Geoffrion's demand that the word "shall" replace the word "may," Mr. Rémillard stated:

It is said that in the resolutions the guarantees which we seek to have for our language, our laws and our institutions are not clearly enough expressed, and that the Imperial Government might, consequently, confer upon us something other than that for which we ask. But could not the Imperial Government impose Confederation upon us as it did the union? And as it does not do so, . . . we ought not to believe that it will impose upon us conditions which are opposed to our interests.³¹⁵

Friday, March 10, 1865 was the final day of debate on resolution 46e. Mr. F. Evanturel (Quebec county) requested the Attorney General West, John A. Macdonald, to explain the resolution and specifically to state whether it was to be interpreted as placing the two languages on an equal footing in the federal Parliament. Macdonald replied as follows: "I may state that the meaning of one of the resolutions adopted by the Conference is this, that the rights of the French-Canadian members as to the status of their language in the Federal Legislature shall be precisely the same as they now are in the present Legislature of Canada in every possible respect."³¹⁶

However, Antoine-Aimé Dorion was not satisfied with this explanation and said:

The Hon. Attorney General West stated that the intention of the delegates at the Quebec Conference was to give the same guarantees for the use of the French language in the Federal Legislature, as now existed under the present union. I conceive, sir, that this is no guarantee whatsoever, for in the Union Act it was provided that the English language alone should be used in Parliament, and the French language was entirely prohibited; but this provision was subsequently repealed by the 11th and 12th Victoria, and the matter left to the discretion of the Legislature. So that if, tomorrow, this Legislature chose to vote that no other but the English language should be used in our proceedings, it might do so, and thereby forbid the use of the French language. There is, therefore, no guarantee for the continuance of the use of the language of the majority of the people of Lower Canada, but the will and the forbearance of the majority. And as the number of French members in the General Legislature, under the proposed Confederation, will be proportionately much smaller than it is in the present Legislature, this ought to make hon. members consider what little chance there is for the continued use of their language in the Federal Legislature.³¹⁷

Macdonald's rebuttal was highly significant, in that it indicates that the French language guarantee was to be rendered fundamental to Confederation by its incorporation in an Imperial Act:

I desire to say that I agree with my hon. friend that as it stands just now the majority governs; but in order to cure this, it was agreed at the Conference to embody the provisions in the Imperial Act. . . . This was proposed by the Canadian Government, for fear an accident might arise subsequently, and it was assented to by the deputation from each province that the use of the French language should form one of the principles upon which the Confederation should be established, and that its use, as at present, should be guaranteed by the Imperial Act.³¹⁸

Macdonald's interpretation was seconded by the Attorney General East, George Étienne Cartier, who stated:

The members of the Conference were desirous that it should not be in the power of that majority [French majority in Lower Canada] to decree the abolition of the use of the English language in the Local Legislature of Lower Canada, any more than it will be in the power of the Federal Legislature to do so with respect to the French language. I will also add that the use of both languages will be secured in the Imperial Act to be based on these resolutions.³¹⁹

But Dorion still clung tenaciously to his original position, and replied to Cartier by stating:

I am very glad to hear this statement; but I fail to see anything in the resolutions themselves which gives such an assurance, . . . But it is not simply for the use of the French language in the Legislature that protection is needed—that is not of so great importance as is the publication of the laws and proceedings of Parliament. . . . The speeches delivered in this House are only addressed to a few, but the laws and proceedings of the House are addressed to the whole people, a million or nearly a million of whom speak the French language.³²⁰

The last member to participate in the debate was Charles B. De Niverville of Trois-Rivières whose words in part were as follows:

As a French-Canadian, it is my business to speak of what concerns us most nearly: our religion, our language, our institutions and our laws. Well then, with respect to our language, I ask whether there is the least danger of our losing it in the Confederation? Far from being in danger, I believe it will be more in vogue under the new *régime*, as it can be spoken and made use of not only in the Federal Parliament and local legislatures, but also in the supreme courts which will be hereafter instituted in the country. I say that when that time arrives—that is to say, when the Confederation is established, we shall have a fuller use of our language.³²¹

2. Section 133 of the B.N.A. Act

1.113. Quebec resolution 46 ultimately became section 133 of the British North America Act,³²² but only after being modified in a sense favourable to those French-speaking members of the legislature who had expressed their opposition to the original draft. The British North America Bill went through five stages before it finally became law. At the fourth stage of drafting, resolution 46 became resolution 127, and the word "shall" replaced the word "may" in the paragraph relative to the journals of the federal Parliament and the Quebec legislature.³²³

The final expression of the language guarantees in section 133 of the British North America Act was the following:

Either the English or the French Language may be used by any Person in the Debates of the House of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

Thus French received definitive recognition in the fundamental law of Canada as an official language. Prior to that its status had rested only on usage, or at best on the rules of the Assembly, first of Lower Canada and subsequently of the united province of Canada after 1848. The latter rules, of course, failed to provide an inflexible guarantee, for they were always subject to change according to the whim of the majority. As Sir Thomas Chapais pointed out:

It is the first time since the conquest that our language has received such constitutional sanction. In 1763 the Treaty of Versailles remained silent on this very serious point. In 1774 the Quebec Act also left it in the dark. In 1791 the Constitution promoted by William Pitt contained nothing on the subject of language. And even if a more or less satisfactory *modus vivendi* was established following the great debate of 1793, this was not a recognition of the legal rights of French. In the dark year of 1840 our language was formally forbidden by the constitution imposed on us. In 1848 it is true that this odious article was revoked by the British Parliament and our legislature recovered its freedom of action on this point. But a constitutional right had still not been enacted. However in 1864 and 1867 French was proclaimed an official language and it was made obligatory that reports, parliamentary journals, documents and legislative Acts be published in French [as well as English]. It was undoubtedly a great national victory.³²⁴

1.114. The effect of section 133 of the B.N.A. Act was to make the French language official throughout the Dominion. This section, in fact, gave a protection, albeit restricted, to two linguistic minorities, the French in Canada and the English in Quebec. The French language was guaranteed in the federal Parliament and courts, while the language of the English minority was protected in the courts and legislature of Quebec. Every law of the Parliament of Canada and of the Quebec legislature has two texts, one in English and one in French. Both texts are passed and both are thus equal in value. Moreover, both federal and Quebec statutes are printed in both languages. The province of Quebec even prints both texts in the same volume opposite each other on the page. This of course, allows for a first-hand comparison of both texts, something not possible at present with federal statutes. In both Quebec and federal courts testimony is offered and judgements rendered in either language. However, as will be shown in section 2.02, the real scope of section 133 is very limited and does not guarantee the full equality of French and English.

1.115. No amending provision was included in the B.N.A. Act. Until 1949, the constitution of Canada could be amended only by an act of the Parliament of the United Kingdom. Although section 2 of the 1931 Statute of Westminster³²⁵ provided for the repeal of the Colonial Laws Validity Act,³²⁶ thereby allowing the Parliament of Canada to enact legislation repugnant to the provisions of any existing or future act of Parliament of the United Kingdom, by the terms of section 7(1), repeal of the Statute of Westminster, or amendment or alteration of the B.N.A. Acts, 1867 to 1930, was excepted from the expanded legislative power conferred on the Dominion. On December 16, 1949, upon a joint address by the Senate and House of Commons of Canada, the United Kingdom Parliament enacted the British North America (No. 2) Act³²⁷ giving the Parliament of Canada the power to amend the constitution of Canada, including the B.N.A. Acts. Even then certain matters were regarded as too fundamental to be left open to unilateral

amendment by the Parliament of Canada. Among them was the use of the English or the French language, and obviously section 133. Thus existing language rights were protected from future abrogation by the Parliament of Canada. However, the terms of the Act also prevent Parliament from *extending* language rights. Only the United Kingdom Parliament can extend them. There can be no doubt then that French and English language rights are protected from amendment by the federal Parliament. What is not so certain is whether section 133 is safe from amendment by the Quebec legislature. This interesting question will be considered in Chapter II.

A. The West before Confederation

1.116. There were four stages in the constitutional development of the Prairie provinces. What is now western Canada was brought under British rule by the Royal Charter of 1670 which incorporated the Hudson's Bay Company. The company's charter is not only the first but also the most important official document relating to western Canada. In 1868 and 1870 two imperial acts transferred the North-Western Territory and Rupert's Land to the Dominion of Canada. The first of these statutes was an Act for enabling Her Majesty to accept Surrender upon Terms of the Lands, Privileges, and Rights of "The Governor and Company of Adventurers of England trading in to Hudson's Bay" and for admitting the same into the Dominion of Canada, dated July 31, 1868.³²⁸ The second was an Imperial Order-in-Council dated June 23, 1870, which effected the transfer of the aforementioned Territory. On June 22, 1869, the new Canadian Parliament passed the first of a series of Dominion acts relating to the government of the West.³²⁹ This statute was the Act for the temporary government of Rupert's Land and the North-Western Territory when united with Canada. The last legislative enactments of fundamental significance to the Canadian West were the Alberta and Saskatchewan Acts of 1905 which created these provinces and provided them with their constitutions. E.H. Oliver has said of the four stages of legislative development of the Canadian West:

... the first handed the country over to a fur company and saved North Western America to the British Crown; the second transferred these Territories to Canada and rendered possible the transcontinental confederation of the provinces; the third defined for this section of the Dominion the conditions under which its social and economic development was fostered and its political consciousness begotten; the fourth marked the culmination of a remarkable constitutional evolution and the commencement, in provincial affairs at least, of complete self rule.³³⁰

1. The Hudson's Bay Company charter

1.117. The Hudson's Bay Company's charter conferred on the 18 grantees the sole right of trade and commerce on all the seas, straits, bays, rivers, lakes, creeks, and sounds

within "Hudson's Straits." As a result of the charter this territory became one of His Majesty's plantations or colonies in America and received the name Rupert's Land. The company was given the right to appoint governors and other officers, to try civil and criminal cases, and to employ an armed force for the protection of its trade and territory. The charter stipulated that justice was to be administered according to the laws of "this Kingdom."³³¹

By these words English became the official language in all territories controlled by the Hudson's Bay Company.

1.118. Under the charter all factors served as magistrates. Cases of outrage were usually tried at Red River or Norway House. Murderers were sent to Canada for trial, in accordance with an 1803 act.³³² Hence those who were brought to Lower Canada for trial could benefit from the statutory provisions there which allowed for mixed juries and pleadings in either English or French. Thus it might be said that the administration of justice in the Hudson's Bay Company was at least indirectly bilingual.

In 1821, another statute was passed which empowered the Crown to appoint justices of the peace to preside at courts of record for the trial of criminal offences and misdemeanors.³³³ However, the act enjoined these magistrates "not to try any offender upon any charge or indictment for any felony made the subject of capital punishment, or for any offence or passing sentence affecting the life of any offender, or adjudge or cause any offender to suffer capital punishment or transportation."³³⁴ Regarding such capital offences, the act provided that "... in every case of any offence subjecting the person committing the same to capital punishment or transportation, the Court or any judge of any such Court, or any justice or justices of the peace before whom any such offender shall be brought, shall commit such offender to safe custody, and cause such offender to be sent in such custody to trial in the Court of the Province of Upper Canada." Thus, inasmuch as the 1821 act placed jurisdiction in capital cases exclusively in the courts of Upper Canada, the trial of such cases must have been conducted in English only.

1.119. The ordinances and notices of the Governors of the Hudson's Bay Company were published in English only. An example is the company's Code of Penal Laws, published at Moose Factory on September 17, 1815. The accompanying public notice provided as follows:

And as there are of necessity foreigners and other persons unacquainted with the Laws of England in the service of the said Honble. Company, who may be ignorant of the consequences attendant upon a breach of the Laws, the Governor of those Territories by and with the advice of his Council, have deemed it prudent to state the leading offences at the foot hereof, and opposite to them the probable punishment which will attach to each, and The Governor and Council, recommend them to the serious consideration not only of the foreigners of whatever nation but also to the entire of the Servants, whether English, Irish, Scotch or Orkneymen.³³⁵

1.120. On June 12, 1811 the Hudson's Bay Company granted to the Earl of Selkirk a large tract of land along the Red and Assiniboine rivers. Under Selkirk's influence a small colony, the Red River settlement, was established in the district of the Assiniboia, the forerunner of the present province of Manitoba. After the fixing of the Canada-United States boundary, the designation District of Assiniboia was applied only to the portion of the original grant which was within British territory. The supreme legislative and judicial

functions within the new community were vested in a Governor and a Council with commissions duly empowered by the Hudson's Bay Company. The Governor and Council of Assiniboia laid the foundations of Prairie legislation and were the first to frame general measures for the public welfare of what is now the Canadian West.

2. *Bilingualism in the District of Assiniboia*

1.121. The history of the Councils of Assiniboia falls into two periods: the Selkirk period and the Company period. The former lasted from the time of the original grant to the Earl of Selkirk in 1811 until the transfer of the District of Assiniboia back from the Selkirk Estate to the Hudson's Bay Company around 1835. By February 12, 1835 a reorganized Council was in existence. Although the records of the Council during the Selkirk regime are scant, it is evident that the members of the Council during this time were all English-speaking, and that the resolutions and proceedings of the Council were all in English. However, there is evidence that a small measure of respect was given to the French language from the very beginning of the colony. Miles Macdonell, the first Governor of Assiniboia, made the following notation in his journal on September 4, 1812:

Friday, September 4, at 12 o'clock today fired our signal gun and hoisted our colours, being the signal agreed on with the N.W. Co., gent'n, that we were ready to begin. They accordingly came across. When *the conveyance was read both in English and French* in presence of all our people and several Canadians and Indians (Mr. Heney having prepared a translation) my Commission was likewise read, at the conclusion of which 7 swivels were discharged and 3 cheers given.³³⁶

1.122. The need for a system of judicature was felt on the arrival of the first band of colonists. Macdonell indicated this need to Selkirk in a letter dated May 31, 1812. In his reply, dated June 13, 1813, Selkirk stated that the jurisdiction of the courts of Canada did not extend to his territories:

The leading and essential point on which the best opinions seem to be united, is that the grant of Jurisdiction contained in the Charter is valid with only a few points of exception, and that is not affected by the Act 43, Geo. III, called the Canada Act. The Jurisdiction conferred by that Act on the Courts of Canada is considered as applicable only to Indian Territories:— and that the Territories of the Hudson's Bay Company being a British Colony, do not come under that description. It follows that if any of our settlers or servants of the Co. should be arrested as Mowat was, and brought for trial to Montreal, he is entitled to challenge the competency of the Judicature and could not then be legally condemned.

He also told Macdonell that the latter would have to appoint a council in order to be able to administer justice properly under the Hudson's Bay Company charter: "By the Charter, the Governor of any of the Co.' establishments *with his Council* may try all causes, civil or criminal, and punish offences according to the law of England. You have, therefore, authority to act as a Judge; but to do this correctly, it is necessary that you have a council to sit as your assessors, and also that you try by Jury all cases which in England would be tried before a Jury."³³⁷

A council was subsequently appointed, and in his Instructions relative to Judicial Proceedings issued to Miles Macdonell and the Council in 1814, Selkirk provided as follows:

Though you cannot pretend to be master of legal forms every trial should be conducted with proper solemnity. Upon any case of importance the charge is to be put in writing and given to the prisoner some time before, and due notice of the time of trial. The prisoner is to be brought to the Bar in open court, confronted with his accusers. The charge is then to be read, and the prosecutor is to call his witnesses, to prove the facts alleged. Each witness is to be put solemnly on oath to speak the truth without reserve. The witness is first to be questioned by the prosecutor and when his examination is finished, the prisoner may cross-question the witness and the members of the court may also put such questions as they think necessary. After all the evidence is heard the Court is to deliberate, either in public, or private as they see fit, and give their determination.³³⁸

There is no indication of any intention to protect the language rights of the Canadians in the courts. No formal provision for such protection is evident until the so-called company period of the Council of Assiniboia.

1.123. This began with the transfer of the District of Assiniboia from the Selkirk Estate to the Hudson's Bay Company. The exact date of the transfer is a complicated and purely academic question. However, by February 12, 1835, the reorganized Council of Assiniboia was certainly in existence.³³⁹ Records of the exact dates of the meetings, complete minutes, and the constituent membership of the Councils during the company period have survived. A perusal of these records evidences an evolving bilingualism, due to the exigencies of communicating with the sizable French half-breed population. This bilingualism was later incorporated into the constitution of the province of Manitoba.

1.124. Formal provision for the publication of the resolutions of the Council of Assiniboia was first made at a Council meeting on Thursday, June 19, 1845. Promulgation of the laws of the district was to be in both French and English and never became a source of irritation to the Métis population. Resolution 33 of the meeting provided:

That one placarded copy be suspended in the Court-house, and another in the office of Upper Fort Garry, that folded copies be deposited, not as private property, but as a public trust, with the Governor, the recorder, the magistrates, the officers of police, and the clerk of the Court, and also be respectfully presented, under the same restriction, to the clergy, of both denominations; and, lastly, that *copies, in both languages*, be read aloud and explained at the meetings of the General Court in November and February of each year, and at such other meetings of the same as the Governor may select for that purpose; the constables being always, specially bound to attend, and receiving a day's pay on each occasion.³⁴⁰

Evidence of the application of the foregoing resolution may be found in a report delivered by Adam Thom, chairman of the Printing Press Committee, at a Council meeting of November 27, 1851. Thom read a letter he had sent on November 25, 1850 to W.G. Smith, Assistant Secretary of the Hudson's Bay Company. The following excerpts are of interest:

6. *As everything must be printed in French as well as English*, we require a supply of accents and cedillas, whether separate or appended to the proper types, we do not know.

7. With reference to the use of two languages, we need as many capitals of the size, aforesaid, of "Amazon" over and above those required in my fourth entry, as may express "Rivière Rouge" and "District d'Assiniboie."³⁴¹

Accession to this request was deferred until the next season because the Governor and Committee of the Company had declined to afford freight for the press without an official application from the Governor and Council of Assiniboia.³⁴²

1.125. Two consolidations of the general enactments of the Governor and Council of Assiniboia were made. The first was enacted on July 13, 1852, and the second on April 13, 1862. They were published in both languages. The consolidation of 1852 contained the following preface: "N.B. — The staple of the following pages is the revised code of July 1852, which supersedes all local laws down to 30th April, 1851. For subsequent enactments of a general character, a space has been left at the foot of each page. In this way may be provided from time to time, a complete view, in *both languages*, of all permanent regulations, without any mixture of extraneous or temporary matter."³⁴³

1.126. The path to bilingualism in the administration of justice in Assiniboia was apparently not as smooth. In 1848, the Canadian and half-breed population held meetings to demand free trade in furs, the abolition of existing laws respecting imports from the United States, and the granting to Canadians and half-breeds of some measure of representation in the Council. The last was a reasonable request, considering the fact that the French-speaking half-breeds far outnumbered the English-speaking white population at that time. Some Métis were also unhappy about the administration of justice in the settlement. Their discontent was brought to a head by the conduct of the Recorder Adam Thom, who refused to address the court in French in the case instituted by the Hudson's Bay Company against William Sayer. Sayer, one McGillis, and two French half-breeds, Laronde and Goullé, had been accused of illegal trafficking in furs with the Indians. The trial occurred on May 17, 1849. The Métis voiced their dissatisfaction at the handling of this case in a turbulent meeting, which prompted Major Caldwell, the Governor of Assiniboia, to summon a session of the Council in order to restore tranquillity. Held on May 31, 1849, it marked the beginning of bilingualism in the courts of Assiniboia. Following are excerpts from the minutes:

... the Council unanimously concurred in opinion ... that the personal liberty of Mr. Thom must be held equally inviolable with that of every other citizen, and that those attempting any infringement on the same must bear the consequences; that Mr. Thom having, at the commencement of the proceedings, *expressed his willingness, in future, to address the Court in both languages*, in all cases involving either Canadian or Half-breed interests, such a line of procedure should be hereafter adopted; ... that, with respect to the infusion of Canadians and Half-breed members into the Council, the Council has no direct power in the matter, but will gladly make a recommendation to the Committee of the Honble. Hudson's Bay Company on the subject.³⁴⁴

1.127. After this meeting there was an increase in French-speaking personnel in the judiciary and on the Council of Assiniboia. The first French-speaking Councillor of Assiniboia was the Rev. Louis Lafèche who was sworn in on Thursday, September 5, 1850. While the French-speaking membership of the Council never equalled the English, the company, from Lafèche's appointment on, ensured that the Canadians and Métis enjoyed

substantial representation. For instance, out of 15 petty judges named at the Council meeting of May 1, 1851, five bore French names.³⁴⁵

1.128. From the foregoing it is evident that the French language enjoyed considerable respect in the District of Assiniboia. Whether or not its status was that of an official language seems never to have occupied the minds of the company-controlled Council. Rather, provision was made for its use where circumstances so demanded, and this policy was never disapproved by the company authorities in London, who even promoted bilingualism by naming French-speaking councillors. A highly legalistic argument may be advanced to the effect that the provisions for the use of French in the General Court of Assiniboia departed from the terms of the charter of the Hudson's Bay Company, which provided that the laws of England should apply in the company's territory. However, resolution 34, on the administration of justice, passed at a meeting of the Council of Assiniboia on Thursday, May 1, 1851, had provided that the laws of England should regulate the proceedings of the General Court "*so far as they may be applicable to the condition of this Colony.*"³⁴⁶

3. Admission of Rupert's Land and the North-Western Territory into Canada

1.129. After 1850, civil rule by the Hudson's Bay Company had become an anachronism. The Council of Assiniboia was ineffectual against the marauding Sioux. A Canada party was formed in the Red River settlement. Canadian agitation for incorporation of Hudson's Bay Company Territory prompted the United Kingdom Parliament to reduce the company to the rank of a commercial corporation, and to transfer its territories to the new Dominion. Section 146 of the B.N.A. Act provided that it should be lawful for Her Majesty on address from the Houses of Parliament of Canada to admit Rupert's Land and the North-Western Territory or either of them into the Union. In pursuance of this Act the British Parliament passed on July 31, 1868, a statute for the admission of Rupert's Land and the Territory into Canada.³⁴⁷ Section 5 of this Act authorized the Parliament of Canada "to make, ordain and establish within the Land and Territory so admitted, all such Laws, institutions, and ordinances, and to constitute such courts and officers as might be necessary for the peace, order and good Government of Her Majesty's Subjects and others therein." An imperial Order-in-Council of June 23, 1870 effected the transfer. On June 22, 1869, the Canadian Parliament passed an Act for the Temporary Government of Rupert's Land and the North-West Territory when united with Canada.³⁴⁸ This Act sought to prepare for the transfer of the Territories from the local authorities to the government of Canada.

1.130. The impending changes met with small favour among the French-speaking Métis population of the Red River Settlement. Hunters for the most part, they feared the advance of English-speaking, Protestant, agricultural settlers, who presented a threat to their language and way of life. The Métis were also angered by the fact that they had been unrepresented in the negotiations by which the territories of the Hudson's Bay Company were transferred to Canada. Nor had they been consulted as to the form of government which was to replace that of the company.

1.131. At the instigation of the Métis leaders, a joint council consisting of 12 English-speaking and 12 French-speaking representatives from the several parishes was organized. John Bruce became the president of this council, and Louis Riel the secretary. The council met intermittently from November 16 to December 1, 1869. On November 24, 1869, it stated that it refused to recognize the authority of Canada and declared itself to be "the only and lawful Authority now in existence in Rupert's Land and the Northwest, which claims the obedience and respect of the people . . ." ³⁴⁹ On December 1, 1869, at its last meeting the council proclaimed a list of fourteen specific rights which it considered indispensable to a satisfactory government of the Northwest. The tenth, eleventh, and fourteenth items sought to protect French minority rights:

10. That the English and French languages be common in the Legislature and Courts, and that all public documents and Acts of the Legislature be published in both languages.

11. That the Judge of the Supreme Court speak the English and French languages

14. That all privileges, customs, and usages existing at the time of the transfer, be respected. ³⁵⁰

The Métis attempt at self-government was abortive, but the advocacy of their leaders for the protection of minority rights was not in vain. When the province of Manitoba was carved out of the Northwest Territories in anticipation of the Order-in-Council transferring the latter to Canada, official bilingualism was made an integral part of the constitution of the new province.

B. Manitoba

1.132. Article 10 of the "List of Rights" prepared by Riel's joint council on December 1, 1869 had demanded "that the French and English languages be common in the legislature and courts, and that all public documents and acts of the legislature be published in both languages."

1. Official bilingualism provided for in Manitoba Act

This duality of language was provided for in section 23 of the Manitoba Act, ³⁵¹ by which the constitution of that province was established:

Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both these languages shall be used in the respective Records and Journals of these Houses; and either of these languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the BNA Act 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Doubts as to the power of the Dominion government to establish provinces in the Territories admitted to the Dominion were removed by the United Kingdom Parliament in the British North America Act of 1871, ³⁵² section 5 of which confirmed retroactively the

Manitoba Act. As we shall see in the next chapter, the combined operation of the Manitoba Act and the 1871 British North America Act can be argued to have made section 23 of the Manitoba Act as fundamental as section 133 of the B.N.A. Act, 1867, which only the Parliament of the United Kingdom could amend. Be that as it may, from 1871 to 1890, when section 23 of the Manitoba Act was repealed, all statutes in Manitoba were published in separate English and French versions, and both languages were permitted in the courts.

1.133. During this period Manitoba legislation embodied a considerable number of provisions giving effect to official bilingualism to an extent exceeding considerably the scope of section 23 of the Manitoba Act.

1. *Municipal notices.* For instance, section 2 of An Act concerning Municipalities³⁵³ provided that a petition for the incorporation of a municipality should be published in both French and English in the *Manitoba Gazette*. In an Act respecting County Municipalities,³⁵⁴ section 72a stipulated that whenever a by-law required the assent of the electors of a municipality, the municipal council, in the county municipalities of Selkirk, Marquette East, and Provencher, had to publish a copy of the proposed by-law in a newspaper in both languages. Section 169 also stipulated bilingual notices in the sale of property seized for unpaid taxes. The duty to publish municipal notices of various types in both languages was again recognized in a statute of 1879.³⁵⁵ In 1884 it was provided that notices of voters' lists in Winnipeg should be published in French and English newspapers in that city.³⁵⁶

2. *Electoral provisions.* As a result of the publication of all statutes in both languages, all forms for oaths, licences, and notices, where given, were bilingual. For example, the Manitoba Election Act³⁵⁷ provided for voters' instructions in both languages, although the ballot form appeared in English only in that version of the statute. Section 16 of the same statute stipulated that voters' lists be certified in both languages by the Clerk, except in the counties of Marquette West and Lisgar. Section 63 stated that the returning officer was to proclaim all elections in both languages.³⁵⁸ Voters' lists were to be prepared and published in each district in each language.³⁵⁹

3. *Provision for other bilingual notices.* The law provided that notices of rectification of title were to be published in the *Manitoba Gazette* or another newspaper in both languages.³⁶⁰ Also notices of the finding of stray animals and the sale thereof were to be published in both languages.³⁶¹

1.134. The period from 1870 to 1890 also witnessed many provisions ensuring bilingualism in the courts of Manitoba. Section 3 of an Act to extend to the Province of Manitoba certain of the Criminal Laws now enforced in the other Provinces of the Dominion³⁶² made provision for the right of an accused to a mixed jury in Manitoba criminal cases (a right now embodied in section 536 of the Criminal Code).³⁶³ Section 52 of the same statute provided that "so much of the laws of the Governor and Council of Assiniboia as are not repealed by the preceding section, or are not consistent with this Act, or with any other Act to be passed during this Session, shall be extended to the whole of the Province of Manitoba," thereby preserving those provisions of the Council which protected the right to use French in the courts. We have also found a number of interesting provisions dealing with juries. For instance, the sheriff was required to draw

up two separate jury lists, one containing the names of French-speaking jurors and the other of English-speaking jurors.³⁶⁴ Aliens were barred from serving as jurors, access to a jury *de medietate linguae* was thus restricted to French- or English-speaking accused.³⁶⁵ The right to a mixed jury in criminal cases was optional rather than compulsory.³⁶⁶ Mixed juries in civil suits were allowed only in the eastern judicial district, as follows:

In any civil suit in which a trial by jury may be legally had, the court may order that the jurors to be summoned to try any issue in such suit shall be composed exclusively of persons speaking the English language; but if any demand be made therefor by any party to the suit, the said court may order that the jurors summoned for such trial shall be composed in equal numbers of persons speaking the English language and of persons speaking the French language.³⁶⁷

Detailed provisions were made for impanelling mixed juries.³⁶⁸ Later aspects of mixed juries in Manitoba will be treated in Chapter V.³⁶⁹

1.135. After the establishment of the province, there was a large influx of English-speaking elements from eastern Canada, the United States, and the British Isles. The French were reduced to a weak minority; according to the census of Canada of 1881 they comprised a population of only 9,688 out of a total provincial population of 62,260, of which 37,155 were of British origin. Inequality of numbers was accentuated by a change in the electoral divisions of the province which sharply reduced French-speaking representation in the legislature. During the first few years of the province's history, the 24 electoral divisions corresponded roughly with parish boundaries. As the population was then distributed, this arrangement amounted to equality in representation between English and French, and Protestant and Catholic, elements. However, the steady influx of English settlers and the rapid growth of new townships outside the old parish divisions quickly upset the balance and English members of the legislature began in 1873 to demand representation by population. The Re-distribution Bill of 1879, which met these demands, provided for eight electoral divisions within the French and Roman Catholic parishes, eight for the old English parishes, and eight for newly settled and outlined townships. In 1881, the square survey replaced the parish system, and religion and ethnic group no longer determined the ratio between French and English in the provincial legislature.³⁷⁰

1.136. Towards the end of the 1880s, the assimilationist policies of D'Alton McCarthy (a prominent Conservative Member of Parliament and one of the founders of the imperialist Equal Rights Association which advocated English unilingualism throughout Canada) were given expression in Manitoba by Joseph Martin, Attorney General in the Greenway cabinet. On August 5, 1889 he appeared on a platform with McCarthy in Portage la Prairie and belligerently demanded the abolition of both separate schools and the official use of French, on pain of his resignation as Attorney General. He thus committed the cabinet to a decision he had taken on largely emotional grounds.³⁷¹

2. Abolition of official bilingualism

The Manitoba government proceeded to give effect to Martin's sentiments and at the session of 1890 passed an Act to provide that the English Language shall be the official

language of the Province of Manitoba.³⁷² This statute, assented to on March 31, 1890, reads as follows:

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Manitoba, enacts as follows:

1. Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the House of Assembly for the Province of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba. The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language.

2. This Act shall only apply so far as this Legislature has jurisdiction so to enact, and shall come into force on the day it is assented to.

By providing that the records and journals of the Legislative Assembly should be in English only, that language effectively became the language of debate as well as of record.

1.137. The French immediately objected that the province had acted *ultra vires* in nullifying what had been validated by an imperial act. If section 2 of the Act is any indication, the Manitoba government itself was uncertain as to the extent of its jurisdiction in language rights, in effect questioning its own power to pass the Act. The Dominion government refused to disallow the legislation, the minister of Justice maintaining that the question was one for the courts to decide, and that disallowance would be too drastic an action to take. Whether or not the Manitoba government had acted *ultra vires* will be considered in the next chapter.³⁷³ However, the attitude of the French was well indicated by Mr. Tarte, who spoke as follows in the House of Commons: "Where is the political man who will contend that the Manitoba legislature had a *right* to abolish the French language? . . . They [the people of Manitoba] prevent us from speaking the French language in the legislature and they do not want it to be taught in the schools. In a word they say to us: we are two against one; we abolish your language not because you have no rights, but because we are stronger than you."³⁷⁴

If, as the federal government contended, the question was one for the courts to decide, the fact remains that there has to our knowledge been no report of any Manitoba case involving the right to use the French language. However, Weir³⁷⁵ reports that in June, 1916 the case of *Dumas v. Baribeault*³⁷⁶ was introduced in the courts of Manitoba to test the legal status of the French language in judicial proceedings. According to Weir, this case arose from the fact that a statement of claim in a civil action was rejected by the prothonotary on the ground that it was written in French, and counsel for the plaintiff sought to secure a ruling from the courts on the matter. The courts upheld the law of 1890. The request for a mandamus was refused without reasons being given. In reply to our inquiry, Mr. J.A. Robin, prothonotary of the Court of Queen's Bench in Winnipeg, wrote us on August 30, 1965, that the records did not disclose any reason for the dismissal of the petition, but that it was probably the 1890 Act under discussion.

1.138. Following the abolition of official bilingualism in Manitoba, statutory provisions providing for communications with the public in both languages became inactive. Some were expressly repealed or altered. For instance, while previously French could be used in the courts, the Queen's Bench Act³⁷⁷ stipulated that testimony was to be given in English, through interpreters if need be. The 1891 Election Act of Manitoba³⁷⁸ no longer required election notices to be printed in both languages. While the 1881 Act to

authorize the changing of the names of Incorporated Companies³⁷⁹ had provided that corporations had to give notice in both languages of any proposed change of name, a subsequent enactment dispensed with the requirement of French notices.³⁸⁰ In 1900 the Manitoba legislature provided that persons who were entitled to vote but did not have the necessary property qualifications should take an oath that they, among other things, could read the Manitoba Act in either English, French, German, Icelandic, or any Scandinavian language.³⁸¹ Thus, by 1900, French, which ten years before had still been one of Manitoba's official languages, was reduced in the eyes of the Manitoba Assembly to the level of German, Icelandic, or any Scandinavian language.

C. The Northwest Territories

1.139. On passage of the Manitoba Act,³⁸² the name Northwest Territories was given to the portion of Rupert's Land and of the North-Western Territory not included in the province of Manitoba. By section 36 of the Manitoba Act, legislation passed in 1868 with reference to the whole former territory was re-enacted with reference to the new and more limited Northwest Territories. It provided that an Act for the temporary government of Rupert's Land and the North-Western Territory when united with Canada should be re-enacted with reference to the Northwest Territories. Section 35 of the Manitoba Act added that the Lieutenant-Governor of Manitoba should also be the Lieutenant-Governor of the Northwest Territories.

1.140. The first Lieutenant-Governor of Manitoba and the Northwest Territories was Adams G. Archibald. A serious outbreak of smallpox within a few weeks of his arrival at Fort Garry prompted him to appoint a three-man council for Rupert's Land and the North-Western Territory. The three men appointed were Francis G. Johnson, Pascal Breland, and Donald A. Smith, representing the three great interests of the West—the English, the French, and the Hudson's Bay Company. However, Archibald had exceeded his powers in forming this council.

1. Beginning of formal government: French representation

It was not until the naming of Archibald's successor, Alexander Morris, that a properly constituted council of 11 persons was appointed to assist the Lieutenant-Governor. Its appointment constituted the beginning of formal government for the Territories. Of the 11 persons, three (Marc Amable Girard, Pascal Breland, and Joseph Dubuc) were Franco-phones. In May 1873 the maximum number of councillors was raised to 22, and, in October of that year, seven additional appointees were named, of which two, Joseph Royal and Pierre Delorme, were French-speaking. Thus at the outset of formal government in the Northwest Territories, the French had five representatives on the 18-member Council.³⁸³

1.141. The Morris administration lasted five years. Though most of the important decisions were taken in the years 1873 to 1875, during that period no Dominion legislation was passed conferring any special legal status on the French language. Noteworthy,

however, are four meetings of the Council which disclose a *de facto* bilingualism or at least multilingualism in the Northwest Territories.

At the meeting of September 11, 1873, the Council acknowledged the services performed by the Reverend J.A. MacKay of Stanley Mission on English River in printing, translating, and publishing the Manitoba Master and Servants Act in the Cree language.³⁸⁴

At the meeting of September 13, 1873, the following resolution was passed: "*Resolved* That the Clerk of the Council be directed and he is hereby directed to apply for fifty English and fifty French copies of the Criminal Statutes of Canada, and for authority to print and distribute printed forms of Summonses &c. &c. as required by the Statute for use of Justices of the Peace in the North-West Territories."³⁸⁵ It was further decided at this meeting that in future all acts of the Council should be published in the English, French, and Cree languages.³⁸⁶ Nevertheless, of the 15 ordinances approved by the Council in the years 1873-75, none was printed for circulation. The ordinances were instead inscribed in longhand in the minutes of the Council.³⁸⁷

A meeting in late 1874 indicates that deference was given to the language of the French members of the Council. The minutes of the meeting contain the following item: "The Committee appointed to consider the case of Indian Children attending Schools in the North-West, reported two Bills, through their Chairman, Honbl. Mr. Dubuc. The Bills referred back with instructions to the Secretary of the Council to enlarge their Preambles and have copies of the Bills printed (in English and French) for the use of Members."³⁸⁸

Finally, the meeting of December 3, 1874 indicates that the Council received and gave full consideration to communications in French. The minutes of the meeting refer to five petitions for incorporation from French-speaking Roman Catholic clerics. A committee on private bills was appointed to consider the petitions.³⁸⁹

From the available material, it appears that both French and English could be used in the petty courts, for several of the judges were French-speaking, and that bills were drawn up for the Council in both languages. One may therefore conclude that in the period prior to the separate political existence of the Northwest Territories, there was a rudimentary and unofficial bilingualism in that area.

2. *Northwest Territories Act (1875) and amendments*

1.142. Distinct political existence for the Territories began with the passage in 1875 of Dominion legislation intended to replace the temporary measures of 1869.³⁹⁰ Unlike the Manitoba Act, this statute contained no reference to, or guarantees of, bilingualism. However, the North-West Territories Act was amended in 1877,³⁹¹ section 11 of the amending statute providing as follows: "Either the English or the French language may be used by any person in the debates of the said Council, and in the proceedings before the Courts, and both those languages shall be used in the records and journals of the said Council, and the ordinances of the said Council shall be printed in both those languages." This section, which had not been in the original bill presented by the authorities, was introduced by Senator Girard of Manitoba. The government would have preferred to leave the matter under local control, but it was too late in the session to send the bill

back to the Senate, and it was allowed to pass.³⁹² Whether or not protecting French language rights was a local matter, the provision does not appear to have been unreasonable, considering that Francophones numbered 2,896 compared with 3,104 Anglophones (including all the other non-Indian groups). The wording of section 11 of the 1877 act was changed slightly in 1880 to read: "Either the English or the French language may be used by any person in the debates of the Council or Legislative Assembly of the North-West Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of the said Council, or Assembly; and all ordinances made under this Act shall be printed in both those languages."³⁹³ In 1886 a minor textual change was again made in this section.³⁹⁴

1.143. The ordinances of the North-West Territories Council of 1878 were the first to be printed for general circulation and appeared in both languages. The French version was printed in Battleford by P.G. Laurie, the first Queen's Printer to the government of the Northwest Territories.³⁹⁵ The English version, however, does not appear to have been printed until 1884, in Regina.³⁹⁶ The practice of publishing the ordinances in English and French continued until 1892 when the Legislative Assembly of the Northwest Territories adopted English as the only language of record.³⁹⁷

1.144. The ordinances of the North-West Territories Council from 1878 to 1892 do not contain many provisions relevant to the status of the two languages. Those that exist all deal with notices to the public, and only one of them unequivocally requires publication in both languages.³⁹⁸ Ordinance 6 of 1881 provided for notices of impounded animals to be inserted by the pound-keeper in the nearest newspaper "in both English and French *if apparently necessary*."³⁹⁹ The ordinance respecting electoral districts provided in section 50 that all proclamations and notices in districts "in which a number of the electors speak the French language" should be in both languages. Two ordinances also provided for interpreters in electoral and school matters⁴⁰⁰ but did not state the language which the voter or the citizen must fail to comprehend to be entitled to an interpreter.

1.145. Judge G.E. Taylor in an article for the *Canadian Bar Review*⁴⁰¹ has claimed that by the establishment of the Supreme Court of the Northwest Territories and the creation of a Legislative Assembly, legislative jurisdiction over the practice and procedure of that Court was conferred on the Assembly. He referred to the Judicature Ordinance of the Assembly,⁴⁰² section 3 of which provided: "The jurisdiction of the Supreme Court of the North West Territories shall be exercised, so far as records, procedure and practice, in the manner provided by this ordinance, and where no special provision is contained as nearly as may be as in the High Court of Justice in England"; and to rule 556 which stated: "Subject to the special provisions of this ordinance the procedure and practice existing at the time of the coming into force of this ordinance in the High Court of Justice in England shall as nearly as may be, be held to be incorporated herewith."⁴⁰³ Judge Taylor claimed that the language of court proceedings is a matter of "practice and procedure" and that the above-mentioned provisions were sufficient to re-establish English as the language of the courts in the Territories since English was the sole language allowed in the Supreme Court of Judicature in England.

We must differ from the learned judge for several reasons. First, section 133 of the B.N.A. Act provided that either language could be used in the courts created by the Parliament of Canada, and the Supreme Court of the Northwest Territories was one of these. Secondly, section 3 of the Judicature Ordinance stated that the jurisdiction of the Northwest Territories Supreme Court was to be exercised "as nearly as may be" as in the Supreme Court of Judicature in England. In our opinion section 110 of the North-West Territories Act as amended in 1891 was not superseded by the provisions referred to by Judge Taylor.

1.146. The passage by the Quebec legislature of the Jesuits' Estates Act⁴⁰⁴ triggered a campaign against French and Catholic influence in Canadian politics. This campaign was led by D'Alton McCarthy, a zealous assimilationist. In July 1889 he announced his intention of proposing legislation to abolish the use of French as an official language in the legislature and courts of the Territories.⁴⁰⁵ That same summer he made a tour through Manitoba and the resulting agitation contributed to the revocation of the language and scholastic guarantees of the Manitoba Act.⁴⁰⁶ In February 1890 he introduced a bill which was prefaced by the claim "that there should be a community of language among the people of Canada."⁴⁰⁷ The proposal, which touched off an avid debate, proved embarrassing to the parliamentary leaders, Macdonald and Laurier—to the former because he was forced to reconcile French-Catholic and English-Orangist elements within the Conservative ranks, and to the latter because he wished to avoid an appearance of treachery to French-Canadian interests without appearing too nationalistic to English Canada. The proposal was ultimately watered down to a compromise which provided that after the next general election in the Territories, the Assembly should itself have the power to regulate the manner in which the proceedings were recorded. This compromise was in the form of a motion amending the motion for second reading and was proposed by Sir John Thompson. It read as follows: "That the legislative assembly of the North West Territories should receive from the Parliament of Canada power to regulate, after the next general elections of the assembly, the proceedings of the assembly and the manner of recording and publishing such proceedings."⁴⁰⁸

The bill, therefore, left the position of the French language in court proceedings untouched and permitted the continuance of the practice of printing the ordinances in French. McCarthy's bill did not pass second reading, but the compromise was embodied in the amendment to the North-West Territories Act introduced in the Senate a few weeks later. On the second reading of this bill in the House of Commons, McCarthy indicated that when it reached the committee stage, he would renew his campaign for abolition of French as an official language. This is probably why the bill was allowed to die on the order paper.⁴⁰⁹ The compromise first proposed by Thompson in the winter of 1890 was finally embodied in an Act to amend the North-West Territories Act, which provided as follows:

Section one hundred and ten of the Act is hereby repealed and the following substituted therefor:—

110. Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals

of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing the same; and the regulations so made *shall be embodied in a proclamation* which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect.⁴¹⁰

Thus, the Assembly was not enabled to touch the use of the French language in court proceedings, and the power to regulate its own proceedings was not to be exercised until after the next Territorial general election. Accordingly, on January 19, 1892, it was moved by Frederick Haultain, "that it is desirable that the proceedings of the Legislative Assembly shall be recorded and published hereafter in the English language only."⁴¹¹ The resolution was passed over some opposition.

1.147. We have come to the conclusion that French was never legally abolished in the legislature of the Northwest Territories because the resolution of Frederick Haultain was never proclaimed as required by the 1891 amendment to the North-West Territories Act. Indeed, the most diligent search has been unable to disclose any such proclamation. On September 15, 1965, we enquired from Hugo Fischer, legal adviser to the department of Northern Affairs and National Resources, whether such proclamation had ever been made. We quote part of Mr. Fischer's reply dated September 24, 1965:

In your letter of September 15 to me you enquired whether the Lieutenant Governor of the North-West Territories ever made the proclamation required by section 110 of the *North-West Territories Act* (as amended by S.C. 1891, c.22) that would have established English as the sole language of the Legislature. No such proclamation could be found in the Public Archives of Canada or other likely source here in Ottawa. The Provincial Archivist of Saskatchewan who would be the depository of the proclamation is of the opinion that it was never made.

Allan R. Turner, Provincial Archivist of Saskatchewan, wrote to Mr. Fischer on September 22, 1965 as follows:

Some time ago I instituted a search for the proclamation embodying this resolution but was unable to find one. I have again checked our indexes to both the Proclamations and the Orders in Council of the period, and have also examined the individual proclamations for the period 1892-1895, without success. I am therefore led to believe that no proclamation was issued subsequent to the action of the Legislative Assembly.

A search of the Dominion Archives was equally fruitless. We quote a letter dated September 22, 1965, addressed by Pierre Brunet, Assistant Dominion Archivist, to Mr. Fischer: "A search of the *Northwest Territories Gazette* for the years 1891-95, and of other logical sources in our custody has failed to locate a Proclamation establishing English as the only official language of the Northwest Territories Legislative Assembly, 1892 or subsequently." Consequently, until proof to the contrary is offered, we conclude that in the absence of the proclamation required by the 1891 Amendment to the North-West Territories Act, the resolution abolishing French in the Legislative Assembly of the Northwest Territories never acquired "full force and effect" and that not only is it still permissible to use French in the debates but the records and journals must still be printed in both languages and should have been so printed without interruption since 1892.

3. Present legal position of French

Furthermore, the use of French in the courts was never affected, since the legislature was never given the power to deal with the question. A perusal of the ordinances of the Northwest Territories from 1892 to 1915, however, reveals that the French language no longer received even the grudging deference accorded to it prior to 1892. In fact, English became the only language officially recognized throughout the Territories. Two examples will illustrate this contention. The Territories Election Ordinance⁴¹² provided for interpretation whenever a prospective voter did not understand English. French was thus placed on the same plane as any other alien language. Also the Coal Mines Regulations Ordinance⁴¹³ forbade the appointment of anyone "unable to speak and read English" to a position of trust or responsibility in or about a mine. On the other hand, a partial recognition of the French element in the Territories can be found in the incorporation of French-speaking clerical corporations under French names.⁴¹⁴

D. Yukon Territory

1.148. On August 16, 1897 the federal cabinet issued a proclamation defining the boundaries of the Yukon judicial district carved out of the Northwest Territories.⁴¹⁵ The following year, Parliament passed the Yukon Territory Act which was assented to on June 13, 1898. By virtue of section 2 of this statute, the Yukon judicial district was "constituted and declared to be a separate territory under the name of the Yukon Territory." The new Territory was to be administered by a Commissioner appointed by the cabinet and instructed by it. The statute also provided for a Cabinet-appointed Council with powers to make ordinances "for the government of the territory," but subject to the power of disallowance by the federal Cabinet. Some legislative power, particularly in the area of taxation and criminal law, remained with the federal cabinet. Section 9 of the Yukon Territory Act stated:

Subject to the provisions of this Act, the laws relating to civil and criminal matters and the ordinances as the same exist in the North-west Territories at the time of the passing of this Act, shall be and remain in force in the said Yukon Territory in so far as the same are applicable thereto until amended or repealed by the Parliament of Canada or by any ordinance of the Governor in Council or the Commissioner in Council made under the provisions of this Act.

The Act also created a territorial court. Section 17 stipulated that only British subjects could qualify for jury duty.

1.149. Under section 9 of the Act the laws existing in 1898 in the Northwest Territories were carried into the law of the newly created Yukon Territory "in so far as the same are applicable thereto until amended or repealed by the Parliament of Canada or by any ordinance of the Governor in Council or the Commissioner in Council."⁴¹⁶ What was the relevant law in the Northwest Territories at that time? We have seen⁴¹⁷ that the attempt by the Legislative Assembly of the Northwest Territories to abolish the use of French as an official language may have been illegal and that in theory French remained with English an official language which could be used in the Legislative Assembly and

should be used in its records and journals. We have also seen that technically speaking French should never have ceased to be an official language of the courts of the Northwest Territories.⁴¹⁸ Therefore the same can be said of the Yukon Territorial Court. Furthermore, as we shall have occasion to see,⁴¹⁹ it would in any case be beyond the powers of Parliament, which set up both the courts of the Northwest Territories and the Yukon Territorial Court, to make them unilingual since section 133 of the B.N.A. Act would prohibit such action. We conclude therefore that today French is still an official language in the Yukon Territory and can be used in both its Council and its courts.

1.150. However, if one is to judge from the ordinances passed by the Commissioner-in-Council of the Yukon Territory, it would seem that only English is deemed to be official. For instance, the Ordinance respecting Elections⁴²⁰ provides that if a prospective voter "is unable to understand the English language" an interpreter shall be provided. The Council seems to have taken for granted that the knowledge of French would not be sufficient and equates French with all other foreign languages. The ordinances contain several other provisions dealing with interpreters in court proceedings and regulating their functions but without indication of language.⁴²¹

E. Alberta and Saskatchewan

1. Creation of the two provinces

1.151. Increased immigration to the Northwest Territories towards the end of the nineteenth century necessitated heavier expenditures for education, public works, and local administration. The introduction of municipal organization into many districts outside the limits of the more densely populated settlements proved to be impossible. Excessive administrative and financial burdens were thus imposed upon the Territorial government. It was evident that a more sophisticated form of government was required for the more populated areas of the Northwest Territories. It will be recalled that under section 2 of the B.N.A. Act 1871, the Parliament of Canada was allowed to create new provinces. In 1905, the Parliament carved out of the Northwest Territories the provinces of Alberta and Saskatchewan by means of the Alberta Act⁴²² and the Saskatchewan Act.⁴²³ Section 16 of each Act provided for the continuation of previous Northwest Territories legislation:

All laws and all orders and regulations made thereunder, so far as they are not inconsistent with anything contained in this Act or as to which this Act contains no provision intended as a substitute therefor, and all courts of civil and criminal jurisdiction, and all commissions, powers, authorities and functions, and all officers and functionaries, judicial, administrative and ministerial, existing immediately before the coming into force of this Act in the territory hereby established as the province of Alberta [or Saskatchewan], shall continue in the said province[s] as if this Act and The Saskatchewan Act had not been passed; subject, nevertheless, except with respect to such as are enacted by or existing under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland, to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the said province[s], according to the authority of the Parliament, or of the said Legislature.

1.152. Since section 110 of the North-West Territories Act, as amended in 1891, was in force in the territories which became Alberta and Saskatchewan at the time of the coming into force of the Alberta and Saskatchewan Acts, it can be argued that this section continued as part of the law of both Alberta and Saskatchewan. A claim has been made that section 18 of the 1891 statute—amending the North-West Territories Act and inserting therein the amended section 110—had been superseded and that consequently section 110 of the North-West Territories Act never formed part of the law of Alberta and Saskatchewan. We do not agree with this assertion which is based on the following arguments. In the “Table of Acts contained in the Revised Statutes of Canada, 1886, and Acts of the Dominion of Canada passed thereafter, showing how much of each is in force and how each has been dealt with,” to be found in the Revised Statutes of Canada, 1906⁴²⁴ the commissioners responsible for the revision refer to section 18 of the 1891 Amendment Act as follows: “Superseded by 4-5 E.VII, c.27, s.8, recommended for repeal.” This latter statute, An Act to amend the Act respecting the North-West Territories, was assented to on July 20, 1905, the date of assent of both the Alberta and the Saskatchewan Acts. Section 8 of this allegedly superseding statute was limited to disestablishing the Supreme Court of the Northwest Territories. Obviously, the 1906 commissioners assumed that this disestablishment was sufficient to supersede the language provision of the 1891 act. We are of the opinion that the commissioners read too much into section 8 of the 1905 statute. Furthermore, even if this interpretation were correct, all three statutes of 1905—the Act to amend the Act respecting the North-West Territories, the Alberta Act, and the Saskatchewan Act—came into force on the same day, September 1, 1905, and it cannot be said that one preceded the other. If additional proof is needed that section 110 of the North-West Territories Act as amended in 1891 was carried into the laws of Saskatchewan and Alberta, it is to be found in an Act to amend Schedule A to the Revised Statutes, 1906. Section 1 of this statute stipulated expressly that the 1891 statute amending the North-West Territories Act and introducing section 11, was not repealed as regards the provinces of Saskatchewan and Alberta.⁴²⁵ Consequently, on the basis of the foregoing analysis and of our opinion that French was never legally abolished in the legislature of the Northwest Territories, we believe that as of September 1, 1905, the law of Alberta and Saskatchewan provided for the use of either English or French, not only in the debates of the Legislative Assembly of each province but also in all proceedings before the courts and required that both languages be used in the records and journals of the provincial legislatures and in the printing of all provincial statutes (if statutes can be equated with “ordinances”).

2. Analysis of the legal status of French

1.153. We have carefully examined all the relevant statutes of both Alberta and Saskatchewan from the time of the first legislative session of each to the present day, and have been unable to find anywhere an express repeal of the 1891 provision.⁴²⁶ While no Alberta or Saskatchewan statute expressly abrogates the use of the French language, neither does any specifically allow it in the legislature or in the courts. One may thus well wonder whether section 18 of the North-West Territories Amendment Act of 1891,

which, as we have seen, was carried into the law of these provinces, is still in force or whether, on the contrary, this provision has been superseded or virtually repealed or rendered obsolete by subsequent legislation. Neither the mere passage of time nor the lack of practical utility resulting from the small size of the French population in either province would be enough to render the provision null, for, as Elmer A. Driedger, then deputy minister of Labour, has said, "The duration of a statute is *prima facie* perpetual. A statute is not effaced by lapse of time, even if it is obsolete or has ceased to have practical application."⁴²⁷

Can we find the answer by statutory interpretation? It must be recalled that the 1891 provision made French an official language in both the legislature and the courts of the Northwest Territories. Section 14 of both the Alberta and the Saskatchewan Acts provided that until "the said Legislature otherwise determines, all the provisions of the law with regard to the constitution of the Legislative Assembly of the Northwest Territories and the election of members thereof shall apply, *mutatis mutandis*, to the Legislative Assembly of the said province and the elections of members thereof respectively." It has been held⁴²⁸ that the words "constitution of the Legislative Assembly of the Northwest Territories" did not include the 1891 language provision but were confined to the continuation in force of chapters 2 and 3 of the consolidated ordinances of the Northwest Territories, entitled respectively an Ordinance respecting the Legislative Assembly of the Territories, and an Ordinance respecting Elections. In neither ordinance is there any mention of the language of debate or record to be used.⁴²⁹ To our knowledge, this decision of Mr. Justice Prendergast, of the Supreme Court of the Northwest Territories, is the only judicial pronouncement on this question. It is certainly not an authoritative judgement. One can argue with equal weight that the words "all the provisions of the law with regard to the constitution of the Legislative Assembly of the Northwest Territories" would include such a vital provision as the 1891 recognition of French. Furthermore, there is nothing in the earliest provincial statutes dealing with the Legislative Assembly in either province⁴³⁰ or in the subsequent amendments thereof to suggest that French may or may not be used in the debates or records of either Assembly. Their rules are also silent. On the other hand, it must be admitted that French does not appear to have ever been used in the legislatures of either province.⁴³¹ Nor is there a single Alberta or Saskatchewan statute requiring that the laws of those provinces be published in both languages, and, in fact, they are published in English only. From a practical point of view, there is no doubt that French is no longer an official language of those parts of the Northwest Territories which became in 1905 the provinces of Alberta and Saskatchewan. From a strictly legalistic point of view, however, we feel that a clear-cut case cannot be made for supersession of the language provision and that there is some plausibility in the view that French can still be used in the Legislative Assemblies of those provinces, which might even be required to publish their statutes in both languages. It is obviously impossible to be categorical and we limit our opinion to the guarded statement that the legal situation is far from clear.

3. *Is French still an official language?*

1.154. The situation is equally muddy with respect to the language of the courts in these provinces. Section 16 of both the Alberta and the Saskatchewan Acts provided that all courts of civil and criminal jurisdiction of the Northwest Territories should continue in each province as if either Act had not been passed, at least until abolished by the Parliament of Canada or by the provincial legislature. Furthermore, section 3 of both Acts provided that the B.N.A. Acts of 1867 and 1886 should apply to each province as if each had been one of the provinces originally united. It will be recalled that section 92(14) of the B.N.A. Act 1867 confers on the provinces legislative jurisdiction over "the Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." For two years neither province legislated on the subject. Then in 1907 Saskatchewan passed a Judicature Act⁴³² and Alberta its Supreme Court Act.⁴³³ Each abolished the jurisdiction of the Supreme Court of the Northwest Territories within the province. In effect, all the courts to which the 1891 language provision of the North-West Territories Act specifically applied were disestablished by legislation in both provinces.⁴³⁴ However, French was never specifically abolished. If the 1891 language provision is interpreted strictly, as being limited to the specific institutions of the legal entity known as the Northwest Territories, it might be argued that from 1907 on, these institutions having ceased to exist in the two provinces, the new courts could not be bound by the language provision. On the other hand, if a broader point of view is adopted and the 1891 provision is taken as guaranteeing language rights within the courts of a territory, it can be said with equal authority that there is nothing in the legislation of Alberta or Saskatchewan abrogating the right to use French in their courts. While here again we are not prepared to say that the question can be answered categorically one way or another, we must note that recent jurisprudence in Alberta has raised the possibility that French is still recognized as one of the official languages which can be used in the courts of that province. Indeed, in the case of *General Motors Acceptance Corporation of Canada Ltd. v. Perozni*,⁴³⁵ Mr. Justice Tavender held that French was a "permissive language" in the Legislative Assembly and the courts of Alberta. In addition to the foregoing arguments, Mr. Justice Tavender ruled that under the laws of England in force in Alberta it would appear that French is a permissive language where it has been used by custom. The Court took judicial notice of the fact that there are certain areas in Alberta which have been inhabited by French Canadians for a period running back to the beginning of the history of the area.⁴³⁶ The same reasoning might be applied to Saskatchewan. If this view is adopted, an additional argument for the right to use French in the courts and legislatures of these provinces would result from custom and usage. But it must be admitted that the very same argument can be turned against this view since it could be said that by custom and usage French has ceased to be an official language in either province. In fact, the rules of the courts in both provinces bear this out by providing that where a party does not understand the English language the court, at its discretion, may provide an interpreter.⁴³⁷

1.155. The question whether French is still an official language in Alberta and Saskatchewan is a difficult and to some extent an academic one. Although research has not

enabled us to resolve it satisfactorily, we think that the problem should be pointed out and solved either by judicial decision or by legislation. Apparently, the only pertinent legislative provision in Alberta was section 40 of the Interpretation Act⁴³⁸ ("When by Act public records are required to be kept or any written process to be had or taken, the records or process shall be kept, had or taken in the English language"), which, surprisingly enough, does not appear in the 1958 revision of the Act.⁴³⁹ Mr. Justice Tavender of the Alberta District Court has interpreted this section in the above-mentioned case of *General Motors Acceptance Corporation of Canada Ltd. v. Perozni* in the following manner:

This is as far as I have been able to determine the only reference in any Alberta statute to the use of the English language. By it all "public records" are to be in English. I have looked at the definition of "public record" in several places and I have examined some of the text books on the law of evidence as it concerns "public records" or "public documents." I have come to the conclusion that "public records" refers to certain records or documents which are kept by certain government officials whose duty it is to inquire into and record permanently matters and facts about public matters. Under this definition would fall vital statistic records, census records, court and certain government tribunal records, etc. I do not think private documents such as conditional-sales agreements, bills of sale, etc., are properly classed as "public records." I was referred to an Oregon case in which the court there held that a registered mechanics' lien was a public record. I do not consider this to be a sound decision under our law. The use of the word "process" in the statute refers, in my opinion, to judicial process—statements of claim and defence, writs, etc.⁴⁴⁰

However, Mr. Justice Tavender was referring to a provision which had ceased to exist seven years earlier.

F. British Columbia

1.156. What is now the province of British Columbia was formerly part of the Indian Territories. Two imperial statutes extended the jurisdiction of the courts of Canada to the Indian Territories, including British Columbia.⁴⁴¹ As a result, royal prerogative did not suffice to establish colonial government in British Columbia since it was beyond the powers of the Crown to override a statute of Parliament. Hence it was by Act of Parliament that Vancouver's Island was established as a colony in 1849.⁴⁴² This statute abrogated the application of the previous legislation as it affected the new colony. Although it did not provide for the establishment of legislative institutions, it did allow for the administration of justice subject to change by an eventual local legislator. The actual constitution for the new colony took the form of a commission and instructions to Governor Blanshard, dated July 9, 1849 and July 13, 1849, respectively. These documents followed the general lines of other prerogative constitutions in North America and more particularly in the Maritimes. We have discussed these in the first sections of this chapter. They imported English law into the new colony.

The colony of British Columbia itself was also established by statute in 1858.⁴⁴³ A commission and instructions were issued to Governor Douglas on September 2 of that

year. He was authorized to make provision for the administration of justice and to enact laws for the peace, order, and good government of the inhabitants. By an Order-in-Council of June 11, 1863, the Governor was empowered to provide for the administration of justice and to constitute a partly representative legislative council in British Columbia. The colony of Vancouver's Island was united to British Columbia by an act of Parliament.⁴⁴⁴ When the B.N.A. Act was adopted in 1867, section 146 thereof recognized the right of Canada to admit British Columbia. This was done by an imperial Order-in-Council dated May 16, 1871. Section 10 of the Schedule to this Order-in-Council rendered the relevant provisions of the B.N.A. Act of 1867 (which must be deemed to include, of course, section 133) applicable. As we know, any doubt as to the ability of the Dominion to create new provinces was removed a few months later by the B.N.A. Act of 1871.⁴⁴⁵

1.157. No British Columbia statute ever conferred official status on any language. The law of England was adopted as the law of the colony from the time of its establishment and the creation of its formal government. At that time English was the official language of all courts in Great Britain.⁴⁴⁶ By custom and usage the official status of English does not seem to have ever been doubted in British Columbia.

1.158. Here we shall review all major documents of continuing constitutional significance for Canada with a view to determining the language in which the official text was passed (as distinguished from any unofficial translation). Most of these documents are reprinted in the *British North America Acts and Selected Statutes, 1867-1962* by Maurice Ollivier. Other statutes referred to have been examined in their original text either in the statutes of Canada or in those of the United Kingdom. A considerable number of documents are also found in Shortt and Doughty's *Documents relating to the Constitutional History of Canada*. Since many constitutional documents are reprinted in Volume VI of the 1952 Revised Statutes of Canada, reference is made to this volume whenever possible.

The inescapable conclusion from the following survey is that the Constitution of Canada today consists of a series of statutes and documents, the most important of which are in only one language: English.

A. Pre-Confederation Documents

1.159. The following list of documents indicates in which language the official text was originally drawn up.

The Articles of Capitulation of the City of Quebec. The French text of the Articles of Capitulation of the City of Quebec was the one originally signed and is the official one.⁴⁴⁷ However, it is clear that there was also an English text at the time of the capitulation since an English text appears in a work published in 1789, *Capitulations and Extracts of Treaties relating to Canada*.⁴⁴⁸

The Articles of Capitulation of the City of Montreal. The official signed text of the Articles of Capitulation of Montreal⁴⁴⁹ was also in French; however, an English version is to be found in *Capitulations and Extracts of Treaties relating to Canada*.

The Treaty of Paris. This was signed on February 10, 1763 in Paris. Articles I to XXVII of the official text are in the French language only; however, the final signed articles of the treaty are in French, Latin, and Spanish.⁴⁵⁰

The Royal Proclamation of 1763. The Royal Proclamation of October 7, 1763 was issued by George III in the English language, and, although a number of French translations exist, only the English text has legal validity. The official text of this Proclamation appears in the English version of the Revised Statutes of Canada, and the translation appears in the French version “à titre documentaire.” This unofficial French translation is taken from *A Collection of the Acts Passed in Parliament of Great Britain and Other Public Acts Relating to Canada*.⁴⁵¹

The Quebec Act. The Quebec Act, 1774,⁴⁵² is an act of the British Parliament and the official text exists in the English language only. However, an unofficial French translation (“à titre documentaire”) appears in Volume VI of the Revised Statutes of Canada.

*The Constitutional Act, 1791.*⁴⁵³ This is likewise an Act of the British Parliament, and the official text is in the English language only. A French translation appears in Volume VI of the Revised Statutes of Canada (“à titre documentaire”).

Order-in-Council of August 24, 1791. This divided the province of Quebec into two new provinces: Upper and Lower Canada. The official text of this Imperial Order-in-Council is in the English language only.⁴⁵⁴

*The Constitutional Act Amendment Act, 1830.*⁴⁵⁵ This is an Act of the United Kingdom Parliament and exists in the English language only. We have been unable to find a French translation.

*Act of Union, 1840.*⁴⁵⁶ This is an Act of the United Kingdom Parliament and the official text is in the English language only. However, a French translation was made at the time, and this translation appears in Volume VI of the Revised Statutes of Canada (“à titre documentaire”).

*The Union Act Amendment Act, 1848.*⁴⁵⁷ This Act relating to the use of the French language is an Act of the United Kingdom Parliament and as such was passed in the English language only. No French translation of this Act appears to be available.

*The Colonial Laws Validity Act, 1865.*⁴⁵⁸ This is again an Act of the United Kingdom Parliament, and was passed in the English language only.

B. British North America Acts and Amendments and Similar Statutes

1.160. The following statutes, except the 1952 British North America Act, are Acts of the United Kingdom Parliament, and their official texts are in English only:

The British North America Act, 1867, 30-1 Vic., c.3

The Rupert's Land Act, 1868, 31-2 Vic., c.105

The British North America Act, 1871, 34-5 Vic., c.28 (Establishment of provinces, validating Canadian acts)

The Parliament of Canada Act, 1875, 38-9 Vic., c.38 (Validating Oaths Act)

The British North America Act, 1886, 49-50 Vic., c.35 (representation of Territories)

The Canada (Ontario Boundary) Act, 1889, 52-3 Vic., c.28

The Statute Law Revision Act, 1893, 56-7 Vic., c.14

The Canadian Speaker (Appointment of Deputy) Act, 1895, 59 Vic., c.3

The British North America Act, 1907, 7 Ed. VII, c.11 (provincial subsidies)

The British North America Act, 1915, 5-6 Geo. V, c.45 (alteration of the constitution of the Senate)

The British North America Act, 1916, 6-7 Geo. V, c.19 (extension of twelfth Parliament)

The Statute Law Revision Act, 1927, 17-8 Geo. V, c.42

The British North America Act, 1930, 20-1 Geo. V, c.26 (agreement with western provinces)

The Statute of Westminster, 1931, 22 Geo. V, c.4

The British North America Act, 1940, 3-4 Geo. VI, c.36 (unemployment insurance)

The British North America Act, 1943, 7 Geo. VI, c.30 (readjustment of representation)

The British North America Act, 1946, 10 Geo. VI, c.63 (readjustment of representation)

The British North America Act (No. 1), 1949, 12-3 Geo. VI, c.22 (terms of union, Canada and Newfoundland)

The British North America Act (No. 2), 1949, 13 Geo. VI, c.81 (amendment of the Constitution)

The British North America Act, 1951, 14-5 Geo. VI, c.32 (old age pensions)

The British North America Act, 1952, S.C., c.15 (this is a Canadian statute)

The British North America Act, 1960, 9 Eliz. II, c.2 (tenure of office of judges).

French translations of the Rupert's Land Act, 1868, and of the Statute of Westminster, 1931, appear in the French edition of the Statutes of Canada in those years, although they are Acts of the United Kingdom Parliament whose official texts are in English only.

C. *United Kingdom Orders-in-Council*

1.161. A number of these deserve attention:

Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory in the Union, June 23, 1870

Order of Her Majesty in Council admitting British Columbia into the Union, May 16, 1871

Order of Her Majesty in Council admitting Prince Edward Island into the Union, June 26, 1873

Order of Her Majesty in Council admitting all British Territories and Possessions in North America and all Islands adjacent thereto into the Union, July 31, 1880.

Their original text is in English but French translations appear in the French version of the Statutes of Canada in their respective years. It should also be noted that the Letters Patent Constituting the Office of Governor General of Canada, effective October 1, 1947, were published in both English and French in the *Canada Gazette*.

D. *Canadian Constitutional Statutes*

1.162. Maurice Ollivier⁴⁵⁹ lists 78 statutes of the Canadian Parliament which affect the constitution of the country. The most important of these would be:

The North-West Territories Act, S.C. 1869, 32-3 Vic., c.3

The Manitoba Act, S.C. 1870, 33 Vic., c.3

The Alberta Act, S.C. 1905, 4-5 Ed. VII, c.3
The Saskatchewan Act, S.C. 1905, 4-5 Ed. VII, c.42
The Terms of Union of Newfoundland with Canada, S.C. 1949, 13 Geo. VI, c.1
The Succession to the Throne Act, S.C. 1937, c.16
The Senate and House of Commons Act, R.S.C. 1952, c.249
The Supreme Court Act, R.S.C. 1952, c.259.

Since they are acts of the federal Parliament, they were noted and published in both languages.

A. Constitutional Provisions

2.01. The sole provision in the British North America Act dealing directly with language is section 133:

Either the English or the French Language may be used by any Person in the Debates of the House of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

The British North America (No. 2) Act, 1949 gave Parliament the right to amend from time to time "the Constitution of Canada."¹ Excluded however from such federal power of amendment were "the classes of subjects . . . assigned exclusively to the Legislatures of the provinces, or . . . rights or privileges . . . as regards the use of the English or the French language." Section 133 of the B.N.A. Act is thus the cornerstone of linguistic jurisdiction in Canada. One cornerstone is not sufficient to support an edifice, however, and section 133 is a rather shaky cornerstone, as an examination of its terms will establish clearly. Indeed a careful analysis of the terms of section 133 leads to the unavoidable conclusion that its scope is surprisingly limited. In effect, it deals only with some aspects of the legislative and judicial processes at the federal level and in Quebec.

It seems to cover the field of legislation quite thoroughly: either language may be used in the debates of Parliament or the Quebec legislature; the records and journals of both these houses shall be bilingual; and all statutes they pass shall be published in both languages. If legislation is considered in its traditional sense, this is indeed unambiguous. However, when it ratified section 133, the United Kingdom Parliament never anticipated the burgeoning of the fertile and vast field of subordinate legislation. The growth of administrative law in the present century has been enormous.² The regulations, rules,

orders, by-laws, ordinances, Orders-in-Council, and proclamations which affect the rights and obligations of citizens in Canada are no longer numbered in the hundreds or even in the thousands, but in the tens or perhaps hundreds of thousands, and the field is ever widening.

The wording of section 133 can hardly be said to embrace any of it within its ambit. Legally speaking, neither federal nor Quebec subordinate legislation is required to be bilingual, and in fact a substantial proportion thereof is unilingual.³ The fact that most federal subordinate legislation and important Quebec regulations are issued in both languages is the result of practical considerations and custom rather than of any constitutional requirement. Admittedly, the custom is old and uniform enough to acquire almost the force of law, but it is not yet law. Section 133 of the B.N.A. Act is perhaps its inspiration, but not its sanction.

The second area to which section 133 applies is that of court proceedings. In "any Court of Canada . . . and in any . . . Courts of Quebec" it is provided that either French or English may be used for "any Pleading or Process." What is meant by "Courts of Canada" and "all or any of the Courts of Quebec" will be discussed in Chapter IV⁴ where we shall note that these terms are by no means free from all uncertainty. Nor are the words "Pleading or Process" crystal clear. The United Kingdom Parliament may have intended to guarantee the right to use either language at every stage of the judicial process, including written pleadings, evidence, and argument, but it certainly did not make its intention as explicit as might have been desirable. Also, the guarantees of section 133 remain somewhat academic in the absence of adequate provisions for bilingual judges and court personnel.⁵ The B.N.A. Act is silent on the right to be tried by a jury composed of members speaking one's own language or by mixed juries.⁶ Furthermore, the Fathers of Confederation had no way of foreseeing the rise of innumerable quasi-judicial boards and commissions exercising many of the functions previously reserved to ordinary courts of law.⁷

In addition to these extremely severe shortcomings, section 133 of the B.N.A. Act completely failed to deal with language rights in the actual conduct of government and public administration. It is utterly silent on the linguistic rights of citizens who communicate with the state or to whom the state addresses notices or official communications.⁸ It makes no provision for the protection of such rights in municipal government.⁹ In fact, the whole vital question of languages is not in any way covered at any level of government, whether federal, provincial, or local. In short the B.N.A. Act does not ensure that the public affairs of any given jurisdiction are conducted in either language. Except for the narrow terms of section 133, there is no guarantee of the right of anyone to use French—or, for that matter, English.

Thus, if we examine objectively the terms of section 133 standing alone, we must conclude that they give very little support to the theory that Canada is a bilingual country. It may be that the legislator thought that the meagre words of section 133 would be sufficient, but, had it not been for the much more generous legislative, judicial, and administrative practices which, as we shall see in the next chapters, have evolved in Canada, it would be obvious immediately that section 133 secures very little.

B. The Ancillary Concept of Language

2.02. Even the most perfunctory student of Canadian constitutional law soon notices that language in this context has two interrelated aspects: it is a matter of cultural survival, and it is also ancillary to the exercise of the powers attributed by the B.N.A. Act to Parliament or to the provincial legislatures. In Canada it has been dealt with generally from the ancillary point of view and has been regulated only as it was found necessary to do so in order to ensure the full exercise of jurisdiction over another competent subject-matter. Such ancillary or incidental legislation is not always indispensable and may be exercised only occasionally. It will tend to be unnecessary in linguistically homogeneous jurisdictions or in areas where, by custom or practice, a single language is used. But where linguistic minorities are large, the legislator may have to regulate the linguistic aspects of certain legislative measures. Many examples of such ancillary legislation will be examined in this study: provisions for interpreters,¹⁰ mixed juries,¹¹ the language of proceedings before boards and commissions,¹² the use of languages in municipal councils, municipal by-laws,¹³ or municipal notices,¹⁴ language qualification for municipal employment,¹⁵ or even municipal office,¹⁶ public notices by government authorities or by individuals to the general public,¹⁷ official forms and returns,¹⁸ language qualifications for certain official, professional, or private employment,¹⁹ the regulation of the linguistic aspects of a number of private activities affecting the general public,²⁰ the language of company charters or company names,²¹ as well as the interpretive provisions in statutes²² and in international agreements.²³ We could provide many other examples, but the ones cited are sufficient to demonstrate that such language provisions are purely incidental to the main purpose of a statute or regulation. In other words, to a considerable extent, language might be characterized as an incidental of the exercise of jurisdiction.

C. Cultural Significance

2.03. Yet the ancillary regulation of language in any society, and particularly in a bilingual one, is undoubtedly secondary to its cultural significance. To say that language is a mere means of communication is to state less than half the truth. It is also, and foremost, the foundation of a particular culture, the prerequisite of its survival, and the vehicle of its propagation. In this perspective, language can no longer be treated as an incidental; it becomes the essential element of ethnic identity and cultural continuity. In fact, for a linguistic minority, the preservation of its judicial and political institutions is meaningful only within the more encompassing goal of cultural self-preservation. Rather than language being ancillary to other ends, these ends may become ancillary to the conservation of language. Even from a detached constitutional point of view, to approach language as a mere ancillary of ordinary or provincial jurisdiction is fruitless and unrealistic. The yawning gaps in the B.N.A. Act have encouraged such an attitude, but it is now obvious that language cannot any longer be considered in Canada as a mere side issue to be ignored whenever possible. It is to a large extent because it has been so treated that we find ourselves in the present constitutional and political impasse. It is true that section

133 in a limited way recognizes the importance of language but, because of its pointedly narrow scope, it is totally insufficient to provide adequate protection to linguistic minorities or to satisfy the demands of a militant French Canada.

D. Jurisdiction over Languages

2.04. Who has jurisdiction over languages in Canada? Does Parliament? Do the provinces? Is there joint jurisdiction? We saw that the British North America (No. 2) Act, 1949, gave to Parliament the right to amend "the Constitution of Canada" except "as regards the use of the English or the French language."²⁴ Could one invoke the *a contrario* reasoning that the language provisions of the Act, and namely section 133, would not have been excluded from the federal amending powers if they had not otherwise fallen within federal jurisdiction? Do language rights which are now withdrawn from Parliament's control and left to the United Kingdom Parliament fall under the "constitution of Canada" which would normally be amendable by the Canadian Parliament? It would be obviously absurd to argue thus that language rights in general are solely within federal jurisdiction. There is no doubt that both Parliament and the provincial legislatures can legislate at will, subject to section 133,²⁵ to regulate the incidental or ancillary linguistic aspects of the exercise of their legislative powers. So far as more substantive linguistic rights are concerned, it would appear that neither Parliament nor the provinces have exclusive jurisdiction. Parliament cannot amend the provisions of section 133 which apply to it or to federal courts, but it can regulate in any way it sees fit the use of languages in federal quasi-judicial functions, subordinate legislation, general public administration, or any area which does not fall within exclusive provincial jurisdiction. Conversely, the provinces seem to enjoy a similar substantive jurisdiction over language in all provincial institutions and within all areas of provincial concern, from their legislatures and courts to their administrative practices and their systems of education.²⁶ As the Privy Council held in *Hodge v. The Queen*,

They [the provincial legislatures] are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws, or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.²⁷

The only province whose right to legislate on language is somewhat restricted by section 133 is Quebec, but even here the constitutional position is far from clear.

2.05. We have seen that section 133 is safeguarded against amendment by Parliament, but is it immune to modification or abrogation by Quebec? It has been generally assumed in Canada and in Quebec that the purpose of section 133 was to guarantee the rights of the English-speaking minority in Quebec from encroachment on its linguistic rights by the provincial authorities as it conversely insured the rights of French Canadians in the federal sphere. How then could Quebec lay claim to the right to abolish these guarantees unilaterally? Yet, although it might appear that section 133 is beyond the reach of the province, a textual analysis of the B.N.A. Act and reference to historical precedent give at least a minimum of plausibility to the opposite view.

The argument would run as follows: the language provisions dealing with the Quebec legislature and courts in section 133 form part of the constitution of the province, just as the same provisions in connection with Parliament and federal courts were found to form part of the constitution of Canada. Consequently, they could be amended pursuant to the power given to the provinces by section 92(1) to amend their own constitutions. Unlike the federal amending power, the language provisions of section 133 are not exempted from the application of the provincial right to amend. Furthermore, *a contrario* arguments could be derived from sections 80 and 93 of the B.N.A. Act where the United Kingdom Parliament, in order to prevent the exercise of provincial jurisdiction in certain circumstances, imposed specific limitations. Section 80 states:

The Legislative Assembly of Quebec shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts in Lower Canada in this Act referred to, subject to Alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant-Governor of Quebec for assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed by the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant-Governor stating that it has been so passed.²⁸

Its obvious purpose was to protect the representation in the provincial legislature of what was then the essentially English population of the Eastern Townships.²⁹ To establish clearly that section 80 could not be modified under the amending powers of section 92(1), it states categorically that it will not be lawful to reappportion the electoral divisions or districts in that region except under certain conditions. Section 93 states:

In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

- (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
- (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
- (3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province,

an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

- (4) In case any such Provincial Law as from time to time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

Here again no doubt is left as to the restrictions on provincial powers. No such limitations are found with respect to section 133, however. In other words, it could be argued with some cogency that in contradistinction to the limitations imposed on the federal amending powers by section 91(1), or on provincial jurisdiction by sections 80 and 93, section 133 is not so protected.

Even more persuasive is the Manitoba precedent.³⁰ It will be recalled that section 23 of the federal Manitoba Act³¹ provided:

Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Since some doubts had been cast on the power of the Dominion government to establish provinces in the Northwest Territories and to pass the Manitoba Act, the United Kingdom Parliament enacted the British North America Act, 1871,³² confirming Ottawa's right to create new provinces. Section 5 of the 1871 B.N.A. Act specifically declared that the Manitoba Act "shall be and be deemed to have been valid and effectual for all purposes whatsoever." Section 6 stipulated that Parliament could not alter the provincial constitution of Manitoba as enacted in the Manitoba Act. Section 23 of the Manitoba Act, which repeated almost verbatim the language of section 133 of the B.N.A. Act, was thus secured against amendment by the Parliament of Canada.

Section 23 gave to the French minorities in Manitoba guarantees analogous to those granted to the English minority in Quebec. The technical difference between the two is that the Manitoba Act was a federal statute ratified by the United Kingdom Parliament, while the B.N.A. Act emanated directly from the United Kingdom Parliament. Since the 1871 B.N.A. Act prevented Parliament from amending the Manitoba Act, it might be said to have raised it to the same level of fundamental law as the 1867 B.N.A. Act. There is, thus, very little, if any, difference in the statutory position of section 23 of the Manitoba Act and section 133 of the B.N.A. Act. Nevertheless, in 1890 the Manitoba legislature abrogated section 23 in the following terms:

1. Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the House of Assembly for the Province

of Manitoba, and in any pleadings or process in or issuing from any court of the Province of Manitoba. The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language.

2. This Act shall only apply so far as this Legislature has jurisdiction so to enact, and shall come into force on the day it is assented to.³³

The bill was never disallowed nor challenged in the courts. If the abrogation of section 23 of the Manitoba Act (which is practically indistinguishable from section 133 of the B.N.A. Act) by a provincial legislature is valid and subsisting, why would Quebec have a different status? The purpose of both sections was the same: to protect similar linguistic rights of an ethnic minority inside a province; both measures were embodied in a constitutional statute which could not be amended by the federal Parliament alone; in both cases the province would be exercising its jurisdiction to amend its own constitution. Conversely, if it is argued that the Manitoba amendment was unconstitutional, Quebec could not change section 133. We do not see how one could be valid without the other being also legitimate.

There is no doubt that the recognition of Quebec's right to amend section 133 would defeat the apparent intention of the Fathers of Confederation, but so did the 1890 Manitoba abolition of French. Nor do we think that any of the arguments we have just outlined are necessarily conclusive or intellectually satisfactory. Nevertheless they cannot lightly be dismissed and they underscore the weaknesses of the constitution in this area. So far, it is true, Quebec has not expressed any intention of changing section 133 and, if it did, it might run into incommensurable political difficulties and eventual disallowance (which in turn might be politically very difficult for the federal government). Still, the possibility of a successful challenge to the untouchability of section 133 cannot be dismissed.

E. Conclusion

2.06. The conclusions to be drawn from the foregoing analysis are self-evident. The B.N.A. Act itself is totally unsatisfactory and does not even provide minimum guarantees to either the French or the English minorities in Canada. Such linguistic rights as exist in Canada will be found to be based generally on custom, practical considerations, or political expediency. When they are embodied in provincial or federal statutes, they can be abrogated at will. We do not underrate the role that custom has played in fleshing out the meagre provisions of the constitution and in ensuring the respect of a minimum of rights. Indeed, it has probably resulted in a more generous recognition of bilingualism than would have been the case had legislation frozen the entire subject prematurely. Custom—and political considerations—will probably continue to play a growing role. This will provide welcome flexibility and adaptability to circumstances. But the enshrinement of language rights in our constitution will not be achieved without a complete revamping of the terms of section 133, not only to define clearly the areas of respective jurisdictions, but also to encompass all legislative, quasi-legislative, judicial, quasi-judicial, administrative, and educational activities in Canadian society. This suggestion that precise language

guarantees be provided in a modern constitution is not made in order to replace custom and practice, but so as to build a floor below which it could never sink again.

3.01. The present chapter is devoted to a study of how bilingual legislation is drafted and published in Canada. It covers legislation by both the federal and Quebec legislatures, the only two jurisdictions which at the present time are required to enact laws in both French and English.¹ While a good deal of attention is paid to the statutes of these bodies, the major part of this study is devoted to the burgeoning field of subordinate legislation or administrative law. Subordinate legislation consists of a multitude of rules, regulations, orders, and by-laws issued by government departments and agencies under delegated parliamentary authority. In other words, this is a type of secondary legislation which has been entrusted by Parliament to various administrative entities. It has assumed enormous proportions in the modern welfare state and affects the daily lives of citizens very often in a much more direct manner than does traditional statutory legislation. Although an increasing amount of attention is beginning to be paid to this phenomenon, it is still a largely unexplored territory, particularly in Canada. Within the general scope of our research project, we have examined the drafting and publication of this subordinate legislation both federally and in Quebec. We have confined our study of provincial subordinate legislation to Quebec for the obvious reason that it is the only province which is likely to use the two languages in its subordinate legislation. We have also tried to determine the practical and juridical difficulties resulting from legislating in two languages, at both the parliamentary and subordinate levels.

3.02. The chapter is based largely on the replies to a series of detailed questionnaires issued to almost all relevant government departments, official agencies, boards, and commissions. A considerable number of interviews were also conducted with various government officials in both Ottawa and Quebec City. In addition, the statute books and regulations were examined, the relevant jurisprudence found, and a great variety of doctrinal writings considered. We also had access to a number of government memoranda and confidential documents which were made available as background material. On the whole, we have enjoyed extraordinary co-operation from officials and administrative units in both the federal and Quebec governments.

3.03. For the history of bilingualism in legislative enactments in Canada, the reader is referred to Chapter I. In summary, bilingual legislation has existed in Quebec from the time of the cession. At one time, under the Act of Union, laws were passed in both languages in both Lower and Upper Canada. In western Canada there was some bilingual legislation by the Council of Assiniboia in the 1850s. Manitoba legislated in two languages from 1870 to 1890. Legislation was also bilingual in the Northwest Territories until 1892. As we shall have occasion to notice, at the present time only the Parliament of Canada and the legislature of Quebec are required to legislate in both French and in English, but this constitutional requirement does not extend to the important field of subordinate legislation where bilingualism, when practised, is generally a matter of custom and not of law.

A. Federal Statutes

3.04. Section 133 of the British North America Act states that the “Acts of the Parliament of Canada . . . shall be printed and published in both [the English and French] Languages.” Rule 74 of the Standing Rules of the House of Commons directs that “All bills shall be printed for the second reading in the French and English languages.”² From a practical point of view, this requirement of publication in both languages resolves itself into a problem of draftsmanship. If federal statutes must be published in French and English, they must be drafted in both languages or in one language and then translated. The purpose of the following sections of the present chapter is primarily to examine the drafting, and secondarily the publication, of federal statutes. It will be found that the universal practice is to draft all federal statutes first in English and to translate them afterwards into French. There is no simultaneous drafting in both languages.

1. The role of the draftsman

3.05. The draftsman of a statute must first of all understand the legislative policy which the statute is intended to express.³ He must examine critically, as a lawyer, the policy which he is to draft into a legislative enactment. He may have to round out that policy and supply a multitude of details since the legislative proposal he receives is in the form of a broad statement. Some of these details and refinements of policy appear only while the statute is actually being drafted. In drafting the statute, the draftsman must consider it in relation to other statutes and the law generally. Where it happens that more than one government department may be interested in a proposed piece of legislation, the draftsman brings together officials from these various departments, and the initial decisions as to the policy of the act may be altered as a result. Sometimes the legislative proposal has not been properly prepared by the departments concerned, and the draftsman must join with the departments in policy discussions. He sometimes has to elicit

decisions on policy or to prepare alternative drafts. In order to understand the legislative proposal fully, he must familiarize himself with its subject-matter, with the legislative problems involved, and with the proposed solutions. Further conferences with the sponsoring department may become necessary for this purpose. Once he truly understands what is expected, he must then plan the kinds of provisions the statute will have to include. This will entail further discussions with the sponsoring department, as a result of which further changes may be made. Finally he is ready to draft. Once he has completed his draft, it must be revised, examined for imperfections, commented upon, and considered and discussed with the sponsoring department until both the sponsors and the draftsman are satisfied with the statute's form and content. It is then submitted to the deputy minister or minister and further conferences take place, after which further change may also be required. In the process, the draftsman, having participated in all the deliberations culminating in the production of a statute, will have become somewhat imbued with the spirit in which the original policy and its subsequent modifications were conceived, and should therefore be more thoroughly acquainted with it than would someone who merely reads his finished product.

We have stressed the participation of the draftsman in the actual elaboration of the statute in order to underline what appears to be one of the most serious reasons for the inadequacy of the French version of federal statutes. The translator has not participated in the drafting. His sole function is to translate. He has been deprived of the opportunity given to the draftsman to familiarize himself with the true intention and purpose of the legislator and is thus at a disadvantage in attempting to convey this intention in another language. Secondly, not having participated in the drafting of the statute, he has had no opportunity to suggest changes in the English version to make both versions more nearly equivalent. As has been found in Quebec, where simultaneous drafting is done more frequently, the preparation at the same time of texts in two languages produces a type of feedback between versions which results in greater clarity and conformity between texts. At the present time the French version of a federal statute constitutes at best a literal translation of an English original drafted without any consideration for the intricacies of the French language or the difficulty of translating technical or legal terms which may not have an exact equivalent in the other language. What problems of interpretation this has led to will be seen in sections 3.40 to 3.46 of this chapter.

3.06. All officials we interviewed confirmed that the universal rule for all federal statutes is that they are drafted in English⁴ (the single recent exception involved a statute emanating from the department of Forestry). The drafts are prepared in the department of Justice by an officer working in conjunction with officers of the various departments concerned in the preparation of the statute. When the initial draft has been prepared, it is submitted to the Legislation Committee which sits in the department of Justice under the permanent chairmanship of the associate deputy minister. The deliberations and work of the Legislation Committee are also entirely in English. Any changes the Committee may suggest will be in English and relate to the English draft. Only after completion of the final draft in the English language is the French version prepared by the Law Translation branch.⁵ The basic reason for unilingual drafting appears to be, in the words of one high-ranking official, that "statutes can only be drafted in one language." According to

him that language must be English rather than French, not only because the majority of departmental officers are English-speaking, but also because a great majority of the officials with whom they must deal in the preparation of legislation in various federal departments are also English-speaking. This official expressed the fear that at the present time there is no alternative to drafting in English only. He also stressed that there is frequently very little time available for drafting and that simultaneous bilingual drafting would slow down the legislative mechanism. He stated that the department of Justice is often called upon to draft statutes in a great hurry. At such times, the French version receives even less consideration than it usually does. However, steps appear to have been taken to attempt a remedy of this situation.⁶ It should be noted that the present practice of drafting all statutes in the department of Justice to ensure uniformity of text was adopted only in 1940. Before then statutes were drafted in and by the department concerned and often introduced in the House without any prior consultation with the department of Justice.⁷

2. Problems of translation

3.07. Skilful translation is always an art. Its demands are succinctly summarized in the *Report of the Royal Commission on Government Organization* as follows:

Translation is not and can never be a purely mechanical process which can be undertaken by anyone with a working knowledge of both languages. It must, if it is to be effective, be a paraphrase which takes account of idiom as well as syntax. The professional translator of informational material must have a broad cultural background to enable him to reach beyond comparable idiom and seek equivalent image. To arrive at the best equivalent of a particular slogan or forceful metaphor may take as many hours as several hundred words of routine translation. Scientific and technical material presents problems that take longer to solve than those of an ordinary text.

In Canada, translation between English and French presents peculiar problems. In each language many words have acquired connotations unknown in the country of origin. French in Canada has absorbed different anglicisms from those adopted in France, as well as many American words and terms, and no good French-American dictionary is available. English usage in Canada has accepted American meanings of some words but adheres to the British meanings of others.⁸

In addition, translation of statutes suffers from its own peculiar difficulties. Traditional legal expressions found in one language and which have a clearly defined meaning in that language sometimes have no equivalent in the other language. Certain technical words or phrases lose much of their meaning in the process of translation. This makes it sometimes difficult to assure consistency. The problem is further compounded in Canada by the existence of two systems of law (the civil law and the common law) which sometimes use the same word to denote different legal institutions or, conversely, use different terms to describe essentially identical notions. How does one translate *meubles* or *immeuble* into English, or *realty* and *personalty* into French? The terms *mortgage on personalty* have sometimes been translated as *hypothèque sur meubles* although the Quebec civil law system does not recognize hypothecs on movables. What is the French equivalent of *beneficial interest*? The difficulty of translating legal terms compounds the many prob-

lems arising from the need to find equivalents of technical terms. In some attempts to translate such terms, words have been used which did not exactly correspond to the original. The difficulties of interpretation that this can lead to will be discussed later in this chapter. The Bureau for Translations has been attempting to avoid some of these pitfalls by italicizing in their original language terms which could not be directly translated.

3.08. The final English draft of federal statutes is translated into French by the Bureau for Translations. In addition to the difficulties inherent in the translation of technical and legal terms, the conditions under which the Bureau appears to operate also contribute to the poor quality of the French version of many federal statutes. The Bureau is not a part of the department of Justice and receives many assignments from other government departments. It cannot devote to the translation of statutes enough time for this arduous task. The Bureau employs no specialists in the fields covered by individual statutes, and, unlike those drafting the original English version, it cannot rely on assistance from experts in the particular fields under consideration. These problems are increased by, and are partly the result of, the difficulty of recruiting competent translators. Applicants for employment with the Bureau must have either a university degree or two years' experience in translation or language teaching. They are required to pass oral and written examinations in translation.⁹ The shortage of trained translators is explained to some extent by the fact that at present in Canada there are only two schools offering courses of training for interpreters and translators: McGill University and the University of Montreal.

3.09. "With French words they make English laws."¹⁰ Adjutor Rivard, as we have seen, was wrong: federal statutes are not badly drafted English laws but poorly translated English laws. Anyone who has examined the French text of any federal statute, even in the most perfunctory manner, has become painfully aware not so much of grammatical errors as of the totally non-Latin and non-idiomatic use of language. In fact, the French text is frequently almost incomprehensible to a French lawyer. The reason was best explained by Rivard:

The way an Englishman likes to develop an idea bears scarcely any resemblance to the way a Frenchman would do it. The mentality, turn of mind and method are different. One may thoroughly grasp the idea of a law as expressed in one language, and yet be unable to translate it properly into the other. Unless the two languages have a common genius and the intellectual processes of both peoples are identical, any attempt at translation is vain if it is not preceded by a complete assimilation of the legal idea to be "transplanted." And that will necessarily involve fundamental modifications, the development of new insights, the organization of both the whole and the parts along different lines—in fact a new concept of the law with all the changes necessary to conform to a different way of thinking, doing and speaking. Any other method of borrowing will lead to deplorable consequences.¹¹

Commenting upon Rivard's thesis, André Dufour, secretary of the Faculty of Law at Laval University, has remarked:

Federal legislation can never be prevented from being of English inspiration, that is, a reflection of British culture, and whatever the quality of the French text, it will remain nonetheless a "*hors d'oeuvre*," a kindness, a favour which will be quickly

forgotten as soon as serious problems occur, namely when the law is applied. Even if federal laws can be reduced into French, the result will never be a law expressing French culture.¹²

3.10. An official of the Bureau for Translations who was interviewed admits that the work of the Bureau is far from perfect, but he believes that it is impossible to resolve the problem within the existing framework. He recommends that the drafting of both the English and French versions be done simultaneously. However, a senior official involved in drafting statutes advised us that he considered such a scheme impractical.¹³ An alternative suggestion by the same official of the Bureau is that translators should at least be present during the preparation of the original English draft in order that they may be more fully acquainted with the subject matter being legislated upon as well as with the spirit and policy according to which the legislation is conceived. We are inclined to believe that this is a stopgap solution which deserves consideration. It might also enable the translator to advise as to more easily translatable English drafts.

3.11. In 1965 we were advised that no improvements were planned until the next revision of the federal statutes which was to take place in 1967, but that there were plans to create two new senior positions to be filled by lawyers trained in civil law and fluent in both languages. These persons would be charged with the revision of the French texts of the statutes. Furthermore a translation staff would be added to the department of Justice, and its work would be revised by these two new officials.¹⁴ On February 23, 1966 Lucien Cardin, then minister of Justice, stated in the House of Commons that steps were being taken to provide for simultaneous drafting rather than translation: "I . . . propose for the sake of accuracy and clarity to take whatever steps are necessary to draft legislation in each of the two official languages in order to avoid the difficulty of interpreting translated law."¹⁵ We sent a follow-up inquiry to the department of Justice on July 3, 1967 and received a reply on July 14 from a senior official, the pertinent passages of which deserve to be quoted:

The problem of simultaneous drafting of federal legislation in French and English has not yet been solved to our satisfaction. We are attempting to combine the preparation of the revised statutes with preparatory steps to the introduction of simultaneous drafting of statutes. The main difficulty lies in the fact that it is virtually impossible to change drafting and procedural techniques in the midst of processing a heavy legislative program. You can appreciate the problem more fully if you look at the most recent of the annual statutes, i.e., the 1966-67 volume. It should be borne in mind that in every jurisdiction, there are many more Bills in course of preparation and actually prepared than are ever enacted in any given Session. It is not likely that this situation will ease in the immediate future.

However, we anticipate that the experience obtained on the revision of the statutes by the officers on both the English and French sides of the revision will enable us to adjust to simultaneous drafting (after the revision is completed) on the first easing-up in the legislative demands. You will appreciate that the real and constant problem in legislative drafting is time.

Further, the matter of simultaneous drafting in two languages poses an additional problem in federal legislation. Our draftsmen have to be conscious of two legal systems; it is not simply a matter of two languages. Satisfactory solutions of the problems created by this factor may take time to work out.

As indicated in Parliament on a few occasions recently, an effort is being made to publish the Revised Statutes in the Fall of 1968. This revision, if at all possible, will be the Revised Statutes of Canada, 1967, and at the moment, the Revision Commission is proposing to include in the revision the statutes of 1952 to the 31st of December, 1967. It has been indicated in the Senate recently that the Revised Statutes will in all probability be bilingual. However, the matter of uniformity between the English and French versions of the statutes is not a matter that can always be achieved by revision under the legislative authority given the revisors by Parliament. Law reform is not an authorized function of statute revisors. But to the extent that it is practicable and feasible to do so, uniformity of expression within the statutes will be attempted in the French version to a greater extent than was done in the 1952 revision in which the greater effort was made in the English version.

It has been the experience of revisors in the provinces, as well as in the federal field, that the improvement of statutory language generally must involve both legislative drafting at the Bill stage and periodic revisions. A general improvement in the language of statutes cannot be achieved by either the annual statutes or periodic revisions alone. It is therefore felt that a procedure for simultaneous drafting with a greater continuity in the revision process will eventually lead to the improvements in both the English and French versions of our statutes that both this Department and the Revision Commission seek and that the Government has indicated it desires.¹⁶

3. English and French editions

3.12. Federal statutes must be published in both languages pursuant to section 133 of the B.N.A. Act. Provisions for such publication are to be found in the Rules and Orders of the House of Commons¹⁷ and in the Rules and Orders of the Senate as well as in an Act Respecting the Publication of the Statutes.¹⁸ At present both the annual federal statutes and the revised statutes are printed in separate English and French editions. Parallel publication would obviously make cross reference between the two versions much easier and would undoubtedly result eventually in an improvement of the quality of both English and French versions.¹⁹ We were given to understand by officials in the department of Justice that at the time of the revision of federal statutes in 1968, but not before, both the English and French texts would be printed adjacent to each other, as is now done in Quebec, rather than in separate volumes, as is required by the Act Respecting the Publication of Statutes.²⁰ However, there was no plan to print any of the annual volumes in this manner, for this procedure is considered far too expensive. On the basis of the experience of Quebec lawyers and Quebec draftsmen of bilingual statutes we are inclined to believe that such added expense would be a very small price to pay for the improvements which might result from printing both versions side by side.

It would appear that private bills in the federal Parliament are not printed in separate French versions for alleged lack of demand. The official French version is only printed when the annual volume of the statutes is published. There is thus a period of time when private bills which have been presented in English are available only in that language. Private bills are not normally reprinted in the Revised Statutes.

B. Quebec Statutes

1. How the statutes are drafted

3.13. There is no centralized drafting of Quebec statutes as there is with federal statutes. We were given to understand in 1965 that many statutes were drafted either by or with the collaboration of the legal adviser of the former Quebec cabinet. Essentially, however, statutes are drafted by the department concerned. As a rule all public bills are drafted in French and then translated. Private bills are not normally drafted by government entities but rather by the attorneys and officials of their sponsors. These bills are drafted in either language in almost equal proportions. The criterion for private bills seems to be the language of the draftsmen. One problem which is peculiar to the drafting of Quebec statutes, and which was stressed by various officials interviewed, is the need for co-ordination with existing federal and provincial legislation. Quebec draftsmen attempt to preserve terminological uniformity. As an officer of the Legislative Committee stated to us, a word used in a certain way four or five years earlier in a statute should not be used in a different way in a new law; a term appearing in the Civil Code should not be given a different meaning in a statutory provision. If at all possible, provincial laws preserve the terminology of comparable or analogous federal statutes. This process is fraught with dangers, and even the French versions of Quebec statutes are subject to the same linguistic criticisms as are the French translations of federal statutes. Complaints about improper use of words, anglicisms, and grammatical or stylistic carelessness are frequent.²¹ The recently created Office de la langue française is apparently compiling a juridical vocabulary and is designed to give advice in linguistic matters to draftsmen with whom it collaborates. As of the late summer of 1965, it apparently had 200 index cards covering frequently used legal terms. However, its work is impeded by the lack of personnel with legal training, and it is essentially a linguistic organization, not a translation bureau.

2. Translation

3.14. Since public laws in Quebec are normally drafted in French, the translation process is basically one of rendering a competent English version of the French draft. Translation in Quebec is decentralized, each department having its own translator, and no serious attempt has yet been made to organize a central translation bureau. We were advised, however, that in the course of the summer of 1965, the Quebec government employed an officer who had been previously with the department of National Defence in Ottawa for the specific purpose of organizing a central system of translation. At the end of August 1965 she was still the only person employed in this project except for a translator working from English into French. It should also be noted that the Legislative Committee of the Quebec legislature, which prior to 1960 had no legal officer or translator in Quebec City, now appears to have more adequate translating facilities: there are two English translators, three English law officers, as well as three French translators and four French law officers. One of the English and two of the French translators translate

when necessary into the language that is not their own. All translation of legislation is revised by a law officer of the language into which the translation is made. The main difficulty encountered in Quebec as well as in Ottawa is the dearth of competent translators. An officer of the Legislative Committee of the Quebec legislature pointed out that ordinary translators do not have the required legal background to translate statutes. The crux of the entire problem of legal translation at all levels, both in Quebec and Ottawa, is that few lawyers want to be translators. We shall have occasion to return to the problem in our discussion of the drafting of subordinate legislation.

3. Publication in both languages

3.15. Section 133 of the B.N.A. Act requires that Quebec statutes be published in both languages. It is the only province subject to this constitutional requirement. This obligation is implemented by various Quebec statutes.²² Since 1942 it has been the practice in Quebec to print the English and French versions of any statute side by side, either on the same page or on opposite pages.²³ In fact, all versions of Quebec statutes (first, second, and third readings as well as the version eventually sanctioned) are printed and issued in this manner, as are the annual printed volumes and the 1964 revision of all Quebec statutes.²⁴

Quebec private bills must be deposited in both languages together with a fee for translation and printing in French and English.²⁵ Private bills are introduced by petition, of which notice must be given in both languages in the newspapers.²⁶ Once they are adopted they are published in the same manner as public bills with the exception that only the most important ones (such as those governing professional bodies) are reprinted in the Revised Statutes.

A. Importance of Subordinate Legislation

3.16. Subordinate legislation, or delegated legislation or administrative law as it is also called, has acquired a fundamental place in the administration of public affairs. Griffith and Street²⁷ have described this development in the following terms:

The growth of subordinate legislation in the nineteenth and twentieth centuries is the inevitable consequence of fundamental changes in the theory and practice of government. More and more functions have been acquired by central and local government authorities; the performance of these functions requires legislative and administrative power; and Governments have found themselves unable to submit to Parliament the full details of their administrative intentions. This inability has been due to many factors. One has been the shortage of available parliamentary time; another has been the difficulty of administering, especially in a new field, a scheme the details of which are largely contained in an inflexible statute. *Solvitur ambulando* is often the only answer that can be given. The opponents of subordinate legislation have been many and vociferous. But the question of its desirability is far more a matter of politics and of administrative law.

Yet, despite its great importance, subordinate legislation has not yet received from political scientists and jurists the attention it deserves. For instance, in Canada, there has not been a single satisfactory textbook published on the subject.²⁸ Nor does there appear to be any study of the manner in which this legislation is drafted and published.

3.17. One purpose of our research was to determine linguistic practices followed in the drafting and publication of this subordinate legislation. We were concerned with establishing the language or languages used to draft administrative law, the manner in which it is translated, the extent to which it is published in one or both languages, and the various problems which arise from legislating at this level for a bilingual country.²⁹

3.18. Our methods of research were threefold. First of all, we studied the pertinent legislative texts and court decisions. Secondly, we conducted a number of interviews in Ottawa, particularly in the department of Justice, with various government officers who

were or had been concerned with the drafting and publication of subordinate legislation. Thirdly, we sent a detailed questionnaire³⁰ on the subject to all government departments and to some 50 agencies of the federal government who are empowered to make subordinate legislation.³¹ The questionnaire was prepared after interviews at the Privy Council office and various government departments, especially the department of Justice. It was reviewed by the deputy minister of Justice for accuracy and completeness before being sent out. Virtually all the departments and agencies to whom the questionnaire applied eventually replied. The answers were generally satisfactory.

The questionnaire dealt with the following questions: the types of subordinate legislation issued by the department concerned; the role of the department of Justice in drafting this legislation; the language of the original draft of the various types of subordinate legislation and the reason for the department's practices; the translation facilities used; delay between publication of the English and French versions; linguistic knowledge of the legal advisers of the departments; problems created by simultaneous drafting and publication in two languages. The answers received have been tabulated and the statistical results will be reviewed.

1. Forms of federal subordinate legislation

3.19. Subordinate legislation appears in many forms: regulations, rules, orders, by-laws, ordinances, and orders-in-council. In Canada, however, the term "regulation" is generally used to define all forms of subordinate legislation falling within the terms of the Regulations Act,³² just as in Great Britain the term "statutory regulations" is used widely. In practice, the term "regulation" is used to describe a form of subordinate legislation having a general application. An order usually refers to a particular case. Sometimes the term "order" refers to the Order-in-Council or order of the Privy Council authorizing and establishing a regulation or order. The term "rule" usually applies to procedural matters, but it has been used in other contexts. The terms "by-law" and "ordinance" are generally used to describe the rules of a particular organization, board, or commission. In Canada the basic division in the field of subordinate legislation is made by the Regulations Act itself. This basic distinction is between subordinate legislation which is covered by the Act and that which is not. There are several reasons for the fact that the Regulations Act does not cover all subordinate legislation. One of them is that because the whole field is still at the development stage, no firm rules exist. Secondly, the definition of the term "regulation" in the Regulations Act is at best an arbitrary one and does not encompass every possible type of subordinate legislation. The definition, in section 2(a), reads as follows:

"Regulation" means a rule, order, regulation, by-law or proclamation

(i) made, in the exercise of a legislative power conferred by or under an Act of Parliament, by a Governor in Council, the Treasury Board, a Minister of the Crown, or a Board, Commission, Corporation or other body or person that is an agent or servant of Her Majesty in right of Canada, or

(ii) for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament, but does not include

(iii) an ordinance of the Yukon Territory or the Northwest Territories,

- (iv) an order or decision of a judicial tribunal,
- (v) a rule, order or regulation governing the practice or procedure of any proceedings before a judicial tribunal, or
- (vi) a rule, order, regulation or by-law of a corporation incorporated by or under an Act of Parliament unless the rule, order, regulation or by-law comes within sub-paragraph (ii); . . .

Obviously this definition does not include the very large body of less formal regulations issued by various government bodies for their internal regulation or on an *ad hoc* basis or as instructions or guides to the actions either of officials or of citizens. It is extremely difficult to draw the line between an order of general application and an order or instruction to a government official such as a customs officer or an official of the Post Office. At first sight, such an order or instruction might seem to be simply a matter of internal administration but in fact it may have very broad and immediate practical consequences and may well affect the rights of large categories of citizens. Therefore, no study of subordinate legislation can limit itself to those regulations defined by the Regulations Act, and we have not so restricted ourselves. Another distinction which must be made is that between regulations which are published in the *Canada Gazette* and those which are not or need not be so published.³³ Part II of the *Canada Gazette* publishes all statutory regulations as defined by the Act. However, section 9 of the regulations issued under the Act exempts a certain number from publication in the *Gazette*:

- (1) *Aeronautics Act* – Orders made by the Air Transport Board that do not apply to all carriers or to a class of carrier.
- (2) *Atomic Energy Control Act* – Orders made by the Atomic Energy Control Board under the Atomic Energy Regulations of Canada.
- (3) *Canada Grain Act* – Orders made under section 11 and orders as defined in section 16.
- (4) *Canadian Wheat Board Act* – Orders made by the Canadian Wheat Board as specified hereunder:
 - (a) Orders entitled “Instructions to the Trade”;
 - (b) Orders addressed to particular persons or corporations only, requiring them to do or to refrain from doing specified things;
 - (c) Orders adjusting grain storage quotas at delivery points according to the availability of storage space from time to time; and
 - (d) Orders providing for the allocation of railway cars available for the shipment of grain at delivery points.
- (5) *Financial Administration Act* – Regulations that deal exclusively with matters of internal practice and procedure within the Public Service, that do not impose fines or penalties, and that are restricted in their application to persons within the Public Service.
- (6) *Indian Act* – Regulations and orders for the control and management of Indian reserves and property, residential and day schools, procedure at band and band council meetings, and generally in respect of all matters of a local or private nature within reserves.
- (7) *National Defence Act* – Regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces, that are restricted in their effect to members of or persons attached to the Canadian Forces.
- (8) *Penitentiary Act* – Regulations made under section 7.
- (9) *Prisons and Reformatories Act* – All regulations made under the Act.

- (10) *Post Office Act* – Orders made by the Postmaster General for the guidance and government of officers and employees of the postal service.
- (11) *Railway Act* – By-laws, rules and regulations made by the Canadian National Railways under sections 290 and 300.
- (12) *Railway Act and other related Acts* – Rules, orders and regulations of the Board of Transport Commissioners for Canada made in the exercise of any power conferred on the Board by the Railway Act or any other Act.
- (13) *Royal Canadian Mounted Police Act* – Orders and regulations relating to the organization, discipline, administration and government of the Royal Canadian Mounted Police, that are restricted in their effect to members of or persons attached to the Royal Canadian Mounted Police.³⁴

The first question of the questionnaire was designed to establish which of the following types of subordinate legislation the department or agency concerned issued: a) those approved by the cabinet pursuant to the Regulations Act upon the recommendation of the minister; (b) those issued directly by the department pursuant to the Regulations Act, and without cabinet approval; c) those excluded from publication in the *Canada Gazette* by section 9 of the regulations passed pursuant to the Regulations Act; d) internal regulations not covered by the Regulations Act; and e) regulations not covered by the Regulations Act but affecting the general public.

We presumed that regulations of type (b) would also be published in the *Canada Gazette* and have found that, with the exception of those emanating from the department of Veterans Affairs, they were. In subsequent questions the five categories were reduced to three: a) regulations published in the *Canada Gazette* (including, thus, the first two categories); b) regulations exempted from publication in the *Gazette*; c) all external and public regulations not covered by the Regulations Act.

It should also be noted that in Question 1 all departments and agencies were required to indicate how many regulations of each type they had issued in the previous twelve months. The results were the following:

Regulations approved by the cabinet. Of the 19 government departments replying, 17 said that they made such regulations. Of seven intermediate agencies which replied, five made regulations within this category. Of the 24 boards and commissions replying, 10, or less than half, made such regulations.

Regulations issued under direct authority. Ten departments out of 19 answering stated that they made regulations under the authority of their minister (regulations of all these departments except the department of Veterans Affairs being published in the *Canada Gazette*). No intermediate agency had such authority, and only two boards out of 24 replying made regulations under the direct authority of the head of their organization.

Regulations exempted from publication in the Canada Gazette. Four departments out of 19 stated that they made this type of regulation. Two out of seven subordinate agencies did so too, and five out of 24 boards and commissions.

Internal regulations not covered by the Regulations Act. In this category, nine out of 19 departments, four of seven intermediate agencies, and 13 out of 24 boards answered in the affirmative.

Regulations affecting the public not covered by the Regulations Act. In this category we find nine departments out of 19, not a single intermediate agency, and nine out of 24

boards. The most significant finding is that there are considerable numbers of regulations which are in fact or in law exempt from publication and about which citizens could not find out anything except by inquiring from the departments concerned and hoping that the answer would be accurate.

B. The Drafting Process

3.20. While all federal statutes have been drafted by the department of Justice since 1940, there is no centralized drafting for subordinate legislation. As a rule, this delegated legislation is still drafted in the department or agency concerned.³⁵ In virtually every department and in the great majority of agencies and Crown corporations, there are a number of legal officers (officers with a law degree and generally members of the bar) whose entire work lies in the field of law. They handle the bulk of the routine legal work of the department or agency. Such work has traditionally included the preparation of regulations to be issued by the department either under the minister's own authority or by submission to the cabinet for an Order-in-Council. The legal officers work in close conjunction with the technical specialists in their departments who provide them with much of the information needed to draft regulations and determine their form.³⁶ Thus, the essential characteristic of the drafting of subordinate legislation is its total decentralization.

The only general official directive available is a memorandum entitled "Recommendations to the Governor in Council."³⁷ This document, as was its predecessor issued in 1964, is more concerned with seeing that each recommendation to the cabinet is presented upon proper authority and in the proper manner than with the drafting process as such. The memorandum enjoins departments to draft regulations clearly and in conformity with the statutory authority and suggests that, whenever possible, lengthy material required to be included in the executive part of an Order-in-Council should be submitted in the form of an annex to the recommendation. The most explicit statement concerning drafting is to be found in paragraph 9 which states in part: "It is suggested that, in drafting such a recommendation, Departmental Officials consult not only the previous *recommendation* of a similar type, but also the *Order-in-Council* resulting from the previous recommendation. Often changes in phraseology are made to departmental recommendations in the preparation of the Order-in-Council, in consultation with the Privy Council Office legal adviser." The Privy Council wants to keep regulations from all departments and agencies as uniform as possible. Paragraph 12 requests officials preparing recommendations to consult with their legal advisers to ensure that the recommendations meet with the requirements of the law. Paragraph 14 refers departments to section 4 of the regulations issued under section 9 of the Regulations Act³⁸ which reads as follows: "Two copies of every proposed regulation shall, before it is made, be submitted in draft form to the Clerk of the Privy Council who shall, in consultation with the Deputy Minister of Justice, examine the same to ensure that the form and draftsmanship thereof are in accordance with the established standards." Section 4 means that in connection with regulations that are to be published in Part II of the *Gazette*, the department of

Justice has, in law, a certain role to play. The nature and extent of this role will be discussed at length in 3.21.

Paragraph 16 of the memorandum requests departments and agencies to send five copies of the proposed regulations to the Privy Council office in English and two in French. Prior to 1964 and under section 5 of the regulations, five copies were required in English and only one in French. Paragraph 17 of the memorandum refers to one of the most significant innovations in the practice of drafting subordinate legislation: the so-called Canadian Bill of Rights Examination Regulations designed to ensure conformity of subordinate legislation with the Canadian Bill of Rights. These regulations read as follows:

4. A copy of every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act shall, before the making of the proposed regulation, be transmitted to the Deputy Minister of Justice by the Clerk of the Privy Council.

5. Forthwith upon receipt of the copy of a proposed regulation transmitted by the Clerk of the Privy Council pursuant to section 4, the Minister shall

(a) examine the proposed regulation in order to determine whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Bill of Rights; and

(b) cause to be affixed to the copy thereof so transmitted by the Clerk of the Privy Council a certificate, in a form approved by the Minister and signed by the Deputy Minister of Justice, stating that the proposed regulation has been examined as required by the Canadian Bill of Rights;

and the copy so certified shall thereupon be transmitted to the Clerk of the Privy Council.

Attention should also be drawn to paragraph 21 of this memorandum which prohibits retroactive regulations except where there is specific statutory authority to the contrary.

This memorandum is obviously designed to improve the standards of drafting of subordinate legislation, at least that which is required to be published in the *Canada Gazette*. It must be noted, however, that apart from the provision requesting five copies in English and two in French, little is said about language. The need to submit recommendations in both languages is in conformity with section 3(i) of the regulations issued under the Regulations Act: "Part Two of the Canada Gazette shall continue to be published by the Queen's Printer under the title 'Statutory Orders and Regulations' on the second and fourth Wednesday of each month in separate editions in the English and French languages." We have also noted that not all regulations need be published in the *Canada Gazette*.

While publication of federal subordinate legislation will be discussed more fully later on,³⁹ the recommendation in paragraph 26 of this memorandum is worthy of note: "Since *orders in Council* are public documents, the Privy Council Office must satisfy all reasonable requests from the public for copies of orders or information about them. In any case where such a request might, in the view of the Privy Council Office, be of particular interest to a Minister, attempts will be made to inform the Minister concerned of the request and the action taken on it."

1. *Role of the department of Justice*

3.21. We have seen that at the present time the overwhelming bulk of subordinate legislation is drafted directly by the department or agency concerned, and we have noted the limited role of the department of Justice and of the Privy Council. There is some opinion inside the department of Justice that it might be better if regulations also were drafted by the department of Justice. There is evidence that the department of Justice has attempted recently to increase its control over the drafting of subordinate legislation. This has been the explicit policy of the former deputy minister and a considerable amount of progress appears to have been made. In particular, one officer of the department of Justice has for the past five or six years been receiving the drafts of all regulations to be published in the *Canada Gazette*, Part II. She is in constant contact with the departments and agencies involved and with the office of the Clerk of the Privy Council. Officially, her duties are no more than the nominal duties set forth in section 4 of the regulations issued pursuant to the Regulations Act, but the amount of work she does and the manner in which she conducts it are at the discretion of the department; and under the control of the former deputy minister, the department has adopted a policy of greatly increased control and intervention.

Although drafts of all proposed regulations are sent to the department of Justice for verification, supposedly only of style, in the last few years there has been a tendency for the department to make considerable substantive changes where the officer involved considered such changes necessary to give clarity to the text. Also, a growing number of regulations are actually drafted in the department of Justice, although, at this stage still, as will be seen from the figures cited in the present section, the work of the department is largely limited to revision of the regulations presented to it for verification before presentation to the cabinet or to revision of the whole body of regulations of an individual department or agency. So far as the language practices of the department are concerned, we are informed that when the initial draft of a proposed regulation is submitted to the department, it is almost invariably in English only. All the work done in the department of Justice, with the possible exception of letters patent referring to Quebec, is in English. The officer involved in this revision practically never sees the French text and when she does, she must have a translation. After verification by the department of Justice, the regulations are returned to the original department and immediately submitted to the Privy Council where, subsequent to further verification for conformity with the Bill of Rights, the regulations are presented to the cabinet. The senior officials of the department feel that translation at the initial stage of verification by the department of Justice, is not feasible because it would slow down the process and could create many difficulties in emergencies requiring swift departmental action.⁴⁰

The second question of our questionnaire was designed to determine statistically the role of the department of Justice in drafting subordinate legislation. Distinguishing between the above-mentioned three general categories of regulations, we asked each department, intermediate agency, and board to tell us whether the department of Justice did the drafting, did a revision of existing regulations, or performed any other role.

The replies were as follows.

Regulations published in the Canada Gazette. Nineteen departments replied. Only one, the department of Finance, stated that the department of Justice performed the entire drafting. Seventeen departments replied that the role of the department of Justice was confined to revising their drafts. Of the seven intermediate agencies replying, four stated that the department of Justice did the work of revision only. The Civil Service Commission said that all the drafting was done by the department of Justice. Of the 24 boards and commissions, six stated that the department was only involved in the revision of their regulations, while two stated that all their drafting and revision were done by the department of Justice.

Subordinate legislation exempted from publication in the Canada Gazette. Out of 19 departments replying, three stated that the department of Justice was not involved at all, and two that it performed the work of revision only, and one that it did all its drafting. Of the seven intermediate agencies, the two which replied to this question stated that the department was not in any way involved. Four of the 24 boards and commissions also replied that the department of Justice was not involved in this type of legislation. Fifteen did not answer.

Regulations not covered by Regulations Act. Of 19 departments, four stated that the department of Justice was involved in the revision only, and 11 that it was not involved at all. The four intermediate agencies replying to this question stated that the department of Justice was not involved at all. All the boards and commissions replying also stated that the department of Justice was either not involved in the drafting of legislation in this category or that the question was not applicable to them.

It would thus appear that although the department of Justice desires to exercise increased control over subordinate legislation, it has either failed to achieve much success or has not tried very hard. It is practically never involved in the actual drafting. Its role seems to be confined to the revision of regulations which are important enough to be published in the *Canada Gazette*. Furthermore, despite the fact that 17 out of 22 government departments resort to the department of Justice for revision, intermediate agencies and boards and commissions seldom do so. The department is practically not involved at all in the drafting or revision of any other type of subordinate legislation. We have not ascertained whether this was the result of a deliberate decision or of circumstances.

2. Role of the Privy Council

3.22. A second office that plays a considerable role in the preparation of regulations to be published in Part II of the *Canada Gazette* is the office of the Clerk of the Privy Council, or more particularly, the Assistant Clerk of the Privy Council and the translator who assists him in his work. The translator is permanently seconded to this office and is mainly concerned with the French texts. We have seen that pursuant to section 4 of the regulations issued under the Regulations Act, and also pursuant to the instructions issued since the 1964 memorandum from the office of the Clerk of the Privy Council, all regulations which must be submitted to the cabinet and will be published in the *Canada Gazette*, must be first presented to the Clerk of the Privy Council. The work of the office of the Assistant Clerk of the Privy Council consists in far more than merely receiving

drafts of proposed regulations and presenting them to the cabinet. In fact, the Assistant Clerk makes changes both before and after presentation to the cabinet. Once the regulation has been approved, the Assistant Clerk and the translator who assists him act as virtual editors of Part II of the *Canada Gazette*, and oversee its preparation and publication. Also before presentation to the cabinet, these two officers must prepare the Orders-in-Council which will authorize the regulation and they will also perform a final revision and co-ordination of the English and French texts. The regulations which are to be published in the *Canada Gazette* must be presented to the Clerk in both English and French. Indeed, a great part of the work of the Assistant Clerk and of the translator, both of whom have legal training, consists in revising and co-ordinating these two texts before their submission to the cabinet. This revision appears to be necessary, either because the French translation is faulty or of doubtful juridical value or because the prior revision in the department of Justice has not been adequate. It appears to be more often necessary when agencies rather than departments are involved, since the former do not have as close links with the department of Justice as do most departments.

3. Choice of language

3.23. The third and fourth questions in our questionnaire were designed to determine the language used in drafting subordinate legislation—a) published in the *Canada Gazette*, b) exempted from publication in the *Canada Gazette*, or c) not covered by the Regulations Act—and the reasons for such choice. To simplify the work of the respondents six possible reasons were provided. The answers can be analyzed as follows.

1. *Subordinate legislation published in the Canada Gazette.* Of 19 government departments replying, 15 stated that regulations of this type are always drafted in English, one stated that French was used sometimes, one said that French and English texts of their regulations were prepared simultaneously, and two did not answer this question. Of the seven intermediate agencies replying, four stated that their regulations were prepared in English only, one said that regulations were prepared simultaneously in English and French, and two did not reply. Of 24 boards and commissions answering the questionnaire, 11 stated that their regulations were always drafted in English, one did not reply to this part of the question, and the others did not answer the question at all or stated that it was not applicable.

2. *Subordinate legislation exempted from publication in the Canada Gazette.* Only nine out of 19 departments replied specifically to this question: five stated that English was the only language used, and two indicated that French was used sometimes. Two out of seven intermediate agencies replied, one stating that such regulations are always prepared in English and the other stating the same thing but adding that a translator was present at certain points. The five boards and commissions replying to this part of the question all stated that English was the only language ever used.

We considered that it would be singularly informative to contrast administrative practices with respect to regulations which are covered by the Regulations Act but which are exempted from publication. We wanted to know what happened when an administra-

tive entity is no longer bound by law to publish its important regulations in both English and in French. Here is what we found.

Two types of departmental regulations are exempted: those under the National Defence Act⁴¹ and Post Office regulations. The department of National Defence prepares and issues the majority of its regulations in this category in the English language. We quote the following comments from the department's reply:

The majority of the rules, orders and instructions under this heading [namely, those exempted from publication in the *Gazette*] are issued in English but as much as possible when they are issued to the military personnel under the jurisdiction of the Army Headquarters at Quebec Command in Montreal they are also issued in French. Generally speaking, the rules, orders and instructions issued within Quebec Command which are of permanent nature are issued in French and in English but those of a temporary nature are issued in French only unless they concern a unit where the majority of the personnel are English-speaking.

The criterion is thus the language of the unit concerned. In Quebec, rules of a permanent nature are issued in both languages and more temporary rules are issued only in French when the unit concerned is fundamentally French-speaking. But the majority of general regulations and particularly the Queen's Regulations and the Canadian Army Orders (which together run to some eight volumes) are published in English only. These, it should be noted, are the general instructions used from day to day in our army units. The opposite seems to be true in the Post Office. There the majority of important general regulations, such as the Manual of Financial Procedure, the Personnel Manual, the Headquarters Directives and the Canada Postal Guide are published in both languages.

The Canadian Penitentiary Service and the Royal Canadian Mounted Police are intermediate agencies whose regulations are also exempted from publication in the *Canada Gazette*. The former stated that its regulations were always drafted in English. It referred to a total of 20 regulations of this type, 18 of which were issued in English only and two in both French and English. When regulations were also published in French, the French publication would arrive between one to three months late. The Service introduced the following optimistic comment:

It is the policy of the Service that the Commissioners Directives (which are exempt from publication in the *Gazette*) shall be issued in both English and French. Due to a massive re-organization and overhaul of its Subordinate Legislation pursuant to the new Penitentiary Act, and to our initial inability to obtain the prompt translation services outside our Service, the considerable time delay has built up as between the French and English texts. Having set up our own translation facility at the Regional Office for the Quebec Region (at St. Vincent de Paul), we are now rapidly closing the gap. It is hoped that within the next year or so, there will be not more than a week or two of lag between the publication of directives in English and French. Simultaneous publication might eventually become practicable.

The Royal Canadian Mounted Police had different feelings and explained the fact that all its regulations are drafted and issued in English only as follows: "Regulations are published in English respecting the organization, training, discipline, efficiency, administration and good government of the Force and generally for carrying purposes and provisions of this Act into effect."

Four boards and commissions which we studied are exempt from publication: The Air Transport Board, the Canada Wheat Board, the Canadian National Railways, and the Board of Transport Commissioners for Canada.

The Air Transport Board drafts all its regulations of this type in English, but publishes them in both languages.

The Canada Wheat Board drafts and issues its regulations in English only. It stated that these regulations were of the following types:

Orders allocating railway cars to delivery points. *Instructions to the trade*: (a) establishing general quotas for the delivery of grain to elevators by producers, (b) establishing quotas for specific delivery points, (c) regarding the issuance of permit books, (d) regarding the delivery of grain to Feed Mills, (e) various instructions to Shippers and Exporters regarding the manner of shipping grain, (f) establishing the terms of sale of Board grain to Shippers, (g) regarding the exchange of grain by producers for seed purposes, (h) regarding inter-provincial transportation of seed grain, (i) regarding export of seed grain. (These Instructions were issued to Shippers, Exporters and to the head offices of Grain Companies.)

The Canadian National Railways makes exempt regulations pursuant to section 293 of the Railway Act.⁴² These regulations are always drafted in English, but are published in both languages as is required by section 298(4) of the Act which requires notices, rules, and regulations which are to be published in Quebec to be in both languages.

The Board of Transport Commissioners drafts all its orders and regulations in English. During the last one-year period, it issued 2,640 regulations or orders in English only, and 500 in both languages. None was only in French. Those published in both languages were "Orders pertaining to matters or works in the Province of Quebec and Orders from any province when the application is made in French. Also General Orders affecting the public." All other regulations are published in English only. While the criterion seems to be territorial, namely whether the order is directed to Quebec, the Board will deal with persons and organizations who approach it in the language used in the request.

It would thus appear that whenever regulations are exempted from publication in the *Canada Gazette*, a French version will not be issued unless absolutely necessary according to the criteria used by the agency involved. Two exceptions are the Post Office and the Air Transport Board. Some agencies seem to confine the issue of French regulations to Quebec. This raises the question of the availability of bilingual texts in New Brunswick and in areas of Canada where there are substantial French-speaking minorities.

3. *Subordinate legislation not covered by the Regulations Act.* This question applied to the language used to draft rules, orders, and instructions which are not included in the Regulations Act and which obviously do not need to be published in the *Canada Gazette*. All 14 departments replying said that such legislation was always drafted in English. Three intermediate agencies replied: one said that English was the only language used; another one commented that sometimes English was used with a translator present and sometimes French with a translator present; the third agency stated that drafting in both languages was simultaneous. Sixteen boards and commissions of a total of 24 replied. Fifteen stated that drafting was done in English only. The Canadian Broadcasting Corporation alone advised that it drafted in English and French simultaneously.

4. *Orders-in-Council*. Orders-in-Council are the oldest and most common form of subordinate legislation. An Order-in-Council is used by the cabinet to authorize all forms of action which it is requested to take or to permit. The originals of Orders-in-Council, signed by the Governor General, are kept in the archives of the Privy Council office. It would seem that virtually all the original copies are in the English language only. Many more private orders, such as the appointment of a judge, are issued in the language of the person concerned. If published, they would appear in one language only and in Part I of the *Canada Gazette*. It would also appear that most of the regulations approved by Order-in-Council either since or before 1947 have been approved in their English version only, although eventually published in both languages in the *Canada Gazette*. Usually only the English text has been approved, signed, and kept in the Privy Council's archives. However, both section 8 of the Regulations Act and section 21 of the Canada Evidence Act⁴³ permit proof of an Order-in-Council by presentation of its texts as published in the *Canada Gazette*. This is indeed a round-about way to render official the unofficial French translation.⁴⁴

Question 4 asked for explanations of the drafting practices just outlined. Of the reasons given by government departments for drafting their subordinate legislation in English, eight cited the language of the drafting officers as being an important factor, while eight singled out the correlative factor, namely a lack of qualified draftsmen in the other language. Seven departments invoked past practice while six also stressed a desire for uniformity. Four departments further referred to the time required by bilingual drafting. One department candidly added, as a further justification, that English was used because it was the language of the superior officers who would have to approve the regulations! Of the intermediate agencies, five cited past practice, three, the language of drafting officers, two, the lack of qualified French draftsmen, and two others a desire for uniformity as the most important reasons for using English only. Twenty-four boards and commissions were queried. Eight invoked the language of the drafting officers, five listed their desire for uniformity of their regulations, four said that they lacked qualified French draftsmen, two invoked a time factor, and one, established custom. Two listed as the principal reason for drafting in English only the fact that most of their work was done in conjunction with the United States. By far the most frequently cited reason for the departmental language practice was the language of the drafting officer; past practice, the lack of qualified French draftsmen, and a desire for uniformity were cited in that order of frequency. It should be noted that many of the departments and agencies replying to this question listed more than one reason for the choice of English.

It is evident that the most important factor in the choice of language for drafting subordinate legislation is the linguistic ability of the draftsmen themselves.⁴⁵ This is not only self-evident, but confirmed by the replies to question 4 of the questionnaire already discussed. From preliminary investigations (later confirmed by the replies to the questionnaire), we were led to assume that regulations would normally be drafted by the legal officer in the administrative entity concerned. We also assumed that departmental legal officers would at least know English. We consequently designed question 9 of the questionnaire to uncover what percentage of legal officers were bilingual—in effect, what percentage knew French in addition to English—and the extent of their knowledge of

either language. We queried, first of all, 22 government departments. Nineteen of these replied stating that they had a total of 180 legal officers. Of these, 45 or 25 per cent were said to be bilingual. All bilingual officers had an excellent command of English, except two who were listed as having only a "good" command. Only seven departments stated that they had at least one officer with an excellent command of French, two said that they had officers with an average knowledge of the language, and another three stated that their bilingual officers' command of French was average to poor. It would thus appear that the bilingualism of these officers consisted essentially of a more or less satisfactory knowledge of French. Furthermore, those officers who were said to have a command of French had a much better reading ability than writing ability, a situation which certainly does not bode well for any attempt at draftsmanship in French. The situation seemed to be slightly better with respect to seven intermediate agencies queried. The three that replied employed 17 legal officers, of whom three (employed in two agencies), or 17 per cent, were bilingual. These officers were said to have an excellent to good command of both English and French. Of the boards and commissions, 16 out of 24 replied, stating that they had a total of 80 permanent legal officers. Nine of them had at least one bilingual legal officer for a total of 21, or 26 per cent of the legal officers. All bilingual officers had an excellent to good command of English. Four agencies replied that at least one of their officers had an excellent command of French and four others that at least one of their officers had a good knowledge of French. Another agency attributed an excellent to good command of French to its single bilingual officer.

C. Translating Subordinate Legislation

3.24. Question 5 of the questionnaire was formulated to determine who translates the three types of subordinate legislation and at what stage translation takes place. These answers can be summarized as follows.

1. How translation is carried out

Government departments normally translate all three types of regulations themselves, using for that purpose departmental officials occasionally but most often translators seconded from the Bureau for Translations. These translators do all the routine translation within the department and are not required to have special legal competence. As to the stage at which translation takes place, 16 of the 22 departments queried stated that regulations to be published in the *Canada Gazette* were translated into French only after the final draft had been prepared in English. The answers were scantier with respect to regulations exempted from publication in the *Gazette*. Four departments indicated that translation was done after the final draft, one stated that it occurred during that stage, and one said that it took place either during or after the final draft. As for the third category of regulations not covered by the Regulations Act, 12 departments stated that translation took place *after* the final draft and two departments did not have any translation at all. Translation generally takes place within a department by a translator seconded from the Bureau for Translations.

In intermediate agencies it would appear that translation is made either within the agency or by the Bureau, although one agency listed the department of Justice and another the department of Finance as doing their own translation. The translators involved are not legal specialists, but the ones who do all the routine translation for the agency. Almost always translation takes place after the final English draft has been completed.

The great majority of boards and commissions replying indicated that translation of regulations to be published in the *Canada Gazette* were made within their own offices or those of other government departments by translators seconded from the Bureau for Translations. Only three out of 11 had their own translators. All translation took place *after* the final draft. The few replies about regulations exempt from publication also indicated that translation took place after the final English draft. The replies were more numerous in connection with regulations which do not fall within the scope of the Regulations Act. Eleven boards out of 14 performed the translation within their own offices and only three entrusted it to the Bureau for Translations or to other government departments. Seven used translators seconded from the Bureau, six had their own translators to do this work, and one relied on the translators of government departments. On all 14 boards the translation took place after the final English draft.

The most significant findings are obviously that in all government entities, regulations are practically always drafted in English and are translated only after a final English draft has been achieved and that relatively few government bodies employ their own translators.

3.25. The present method of preparing and publishing regulations dates back to 1947. Before then, departments were the guardians of their own regulations which were drafted and translated entirely within the departments. Normally the cabinet saw and approved only the English texts, and then the department concerned was at liberty to decide whether or not there would be a French translation and whether this translation would be published. Usually such translation would be published, although not necessarily simultaneously with the English original. Some doubt arises as to the legal validity of these translations which were not approved by the cabinet. This is not merely an academic question since there are a considerable number of regulations antedating 1947 which are still in force.

Although there has been considerable improvement since 1947, at least for regulations which will be published in the *Canada Gazette*, the present system is far from perfect. The French text is prepared only after the whole cycle of drafting has been performed in the English language. It is a mere translation, often inexpertly performed by translators who have no particular competence in law. This is why it is necessary to have a special officer of the Privy Council to catch the more serious errors. However, even this minimum applies only to regulations which are required to be published under the Regulations Act. We have seen that there are 13 types which are exempted from publication and many of these are not issued in both languages. With respect to the large area of rules, orders, and regulations which are not included in the terms of the Regulations Act, the drafting, issue, and publication are frequently done in English only, and where both languages are used the French version leaves much to be desired.

2. Problems of bilingual drafting

3.26. We asked our respondents to indicate what problems would be created by drafting subordinate legislation simultaneously in French and English. Seventeen government departments out of 22 replied to this question. Fourteen expected problems, and only three foresaw that none would occur. All four out of seven intermediate agencies replying predicted problems. Of the 24 boards and commissions investigated, 17 foresaw problems and only four did not see any. In other words, out of 36 replying, 29 were convinced that simultaneous drafting would be difficult and create problems, and only seven did not think that there would be any serious difficulties. The reasons given for this pessimistic view varied. For instance, one department stated: "Even if the draftsman and the drafting officer were both completely bilingual, there is uncertainty that their thoughts would be expressed equally clearly in both languages. The situation would be worse if there were two different drafting teams, one English the other French. In that event I would expect that serious discrepancies between the French draft and the English draft would arise." Another felt that simultaneous drafting would create a problem of interpretation. Several felt that there would be an "unnecessary duplication of work by drafting legal officers when translation is available and satisfactory." Of course, as we have seen, translation is very seldom "satisfactory." However, the department quoted saw no problem of interpretation arising out of simultaneous drafting.

In general the departments, boards, and commissions that opposed simultaneous drafting based their position on their expectation of a number of practical difficulties: extra costs, the need and difficulty of finding competent personnel, problems of communication between draftsmen and senior officers (especially when the latter do not know French and could consequently not pass upon French drafts), unnecessary delays, and problems of interpretation. While we are not in a position to evaluate these various arguments properly, practical problems can be solved by practical solutions. Thus, none of these objections need remain if the decision is made to give the agencies concerned the practical means to meet them. In our opinion, the only serious objection is the lack of qualified legal draftsmen able to draft in both languages or to translate English drafts. This is a problem of training and recruitment. There may indeed be other valid reasons why some regulations which are directed to exclusively English areas need not be drafted in both languages. But unilingual drafting and publication is not limited to minor regulations directed at English-speaking geographical areas. In our opinion, if regulations are to be issued in two languages, the only way to avoid both delays between the appearance of each version and inadequate translation is to have simultaneous drafting in two languages or, at the very least, co-operation between the English draftsman and the French translator from the very beginning of the drafting process.

3.27. In addition to practical problems which might be created by simultaneous drafting, we wanted to know whether the administrative entities queried felt that publication of subordinate legislation in both languages would create special problems of interpretation. Out of 19 government departments replying, nine stated that they could envisage or had actually encountered problems of interpreting texts published in both languages. Ten departments did not anticipate any problems. The four intermediate agencies replying did

not seem to fear any problem. Interestingly enough, when it came to boards and commissions, the 18 replying concluded in an even more pronounced proportion than government departments that no problem of interpretation would result from bilingual publication: 13 against five. In other words, although most government officials expressed serious reservations about the feasibility of simultaneous drafting, they did not object to translation of an original draft and its publication in another language. The following comments indicate the fears of the officials concerned:

... it is felt that if regulations are published in two languages, both texts being equally official, there could be problems of interpretation arising out of the intrinsic difficulty of expressing precisely the same meaning in two different languages.

In dealing with ... conditions which spring from [a] Policy Order, it was found that the translators failed to take advantage of an original Policy Order which had been translated into French for the purpose of publication in the *Canada Gazette*. The result was that the proposed ... conditions given by the translators some years ago did not conform to the original French translation as contained in the *Canada Gazette*.

The latter comment is an obvious illustration of the difficulties resulting from having legal documents translated by translators who are not lawyers. One department felt that differences might occur particularly where the translator was not particularly knowledgeable in the subject-matter but added: "This could perhaps be overcome were both drafts (both languages) prepared before publication of either, and in collaboration between translator and drafter." In other words, the department indicated that conflicts of interpretation could be avoided by simultaneous drafting.

Other comments mentioned both expected and experienced difficulties.

This Department has insufficient experience in this field to have encountered too many problems but there is no doubt that interpretation would be a problem. If rules, etc., were all translated one text would have to be relied upon.

A number of our Regulations have not been so translated into French as to contain the same judicial meaning as the English draft. They have been literal rather than legal translations.

There are always problems when technical terms are used. This is particularly so in the case of export credits insurance which was developed in England. The British expressions and forms have been copied by most other export credits insurers throughout the world. The French equivalents of these expressions vary greatly when used by the French, Belgian or Swiss organizations who when communicating with one another use their own version followed by the English term in brackets.

A situation sometimes may occur where a difference in meaning arises when English regulations are translated into French and vice versa. It would seem that this may well be a continuing problem. The French language often appears to be a more precise language than English and therefore it seems difficult to ensure that certain subtle shades of meaning are accurately translated from French into English and, of course, from English into French. It may not be possible to achieve absolute similarity between the French and English versions of the same regulation.

The Customs and Excise division of the department of National Revenue commented: "Difficulties have been encountered in ascertaining the true meaning of regulations in

appeals to the Tariff Board.” Upon our request for elaboration of this remark, Mr. G. Douglas McIntyre, Q.C., Solicitor for Customs, wrote as follows in a letter dated December 1, 1965:

... I wish to advise you that in several appeals to the Tariff Board, difficulties of interpretation have been resolved by reference to the French texts.

For example, in Appeal No. 764, concerning the “Exeuclette” flushing toilet the respondent had classified the toilet under tariff item 289 as a closet. In the French version of the Customs Tariff, the word is water-closet. The Board accordingly found that the meaning of the word “closet” included the toilet in issue.

In Appeal No. 784 the Tariff Board considered whether pure reconstituted orange juice was exempt from sales tax under Schedule III of the Excise Tax Act which exempts “fruit juices consisting of at least eighty-five per cent of the pure juice of the fruit.” By turning to the French text of the exemption the Board found that the phrase “consisting of” referred clearly to the composition of the juice.

Many other examples could be cited ...⁴⁶

On the other hand, one department, although it opposed simultaneous drafting on practical grounds, had not encountered any difficulty of interpretation of bilingual regulations. Another stated: “... regulations, in one form or another have existed since confederation. [They] were published in both English and French and were distributed to each individual employee according to his linguistic need. No problems in interpretation of any consequence were ever encountered, so far as is now known.”

D. Publication of Subordinate Legislation

3.28. In studying the process of drafting federal subordinate legislation, we have come across various references to rules of publication. The Regulations Act requires⁴⁷ all regulations as defined by the Act to be published in French and English in the *Canada Gazette* within 30 days after they are made, except for 13 categories exempted by section 9 of the regulations adopted pursuant to the Regulations Act. In addition, we know that there are great numbers of orders and regulations which are not covered by the Regulations Act and which may or may not be published in the *Canada Gazette*. We have also had occasion to note the editing role of the Assistant Clerk of the Privy Council in preparing regulations for publication.⁴⁸ By publication we mean printing in the *Canada Gazette*.⁴⁹ We do not refer to various official or semi-official publications issued by departments or agencies in many forms, varying from office consolidations of pertinent statutes and regulations to booklets or pamphlets dealing with particular subjects.⁵⁰

1. Language of publication

The *Canada Gazette* is divided into two parts. Part I contains notices required by law from individuals and corporations and dealing with such things as divorces, bankruptcy, and sundry corporate matters and a variety of government notices including proclamations, certain Orders-in-Council, civil service announcements, and so on. Part I is bilingual in that the French and English texts are published in contiguous columns on the same page. This does not mean, however, that one column is a duplicate of the other. Many

notices published in Part I appear in only one language. Even some government notices are in one language only. A number of government departments still publish notices in only one language. Normally such government notices as will be published in both languages are sent to the office of the *Canada Gazette* in both versions. This is the procedure for all proclamations. On the other hand, the department of External Affairs sends notices of appointments, for instance, in English only and the *Canada Gazette* staff must translate them into French for publication.⁵¹ However, Part I is of secondary interest to us. Subordinate legislation is normally published, when it is published, in Part II of the *Gazette*. Part II is published in two separate versions, one in English, and one in French. On the cover of Part II it is stated that it contains "All Rules, Ordinances, Decrees, Regulations or Proclamations Emanating from a Regulatory Authority in the Exercise of Legislative Power Conferred by Virtue or by Authority of a Law of Parliament." Concerning the publication of regulations not covered by the Regulations Act we have no detailed information, and found that such information would be extremely difficult to obtain. Departments and agencies tended to regard it as private information of interest only to themselves. Some of these regulations may appear in the *Canada Gazette*, and if one wishes one can generally obtain copies of unpublished regulations by writing to the department or agency concerned. Also the recommendation of the Privy Council's memorandum, in paragraph 26 quoted previously, should be recalled in this connection.

3.29. Questions 6, 7, and 8 of our questionnaire were aimed at establishing administrative practices in relation to the publication of subordinate legislation exempt from compulsory publication in the *Canada Gazette* or not covered by the Regulations Act. We wanted to find out in what language these types of regulations were published, when published, and whether there was a delay between the publication in one language and the other.

Of the government departments queried, four stated that some of their regulations exempted from compulsory publication in the *Gazette* were published in both English and French, but that they published some regulations in English only. Two said that they published some regulations in French only. However, most regulations were published in English only or in both English and French. Very few were published in French only. Precise figures could not be obtained. As for regulations not covered by the Regulations Act, 10 departments stated that they published their regulations in both languages, eight also indicated that they published some regulations in English only, and only two declared that they had published regulations in French only. Again, most of these rules, orders, and instructions are published only in English, although a substantial number are published in both languages. Very few are published in French only.

Two intermediate agencies stated that they published regulations exempted from publication in the *Gazette* in both English and French, and three declared that they published such legislation only in English. Only one had ever published regulations in French only. Concerning rules, orders, and instructions that are not covered by the Regulations Act, one agency stated that publication took place in both languages, but two declared that they published such legislation in English only. Again, the great bulk of these regulations of intermediate agencies was published in English only.

The replies from boards and commissions were similar. Three of them stated that certain of their regulations normally exempted from publication in the *Canada Gazette* were nevertheless published in both languages, and three that they would be published only in English. None said that this type of legislation was ever published in French only. As for orders not covered by the Regulations Act, 11 boards and commissions indicated that they would be published in English and French, but of these 11, 10 stated that certain of these regulations were published in English only, and only one said that it published some orders in French only. We were unable, however, to obtain satisfactory figures indicating the number of regulations of each type published in one language or the other.

On the whole, it would appear that when regulations are either exempted from compulsory publication in the *Canada Gazette* or not covered by the Regulations Act the tendency of most administrative entities when publishing these regulations is to do so in English only, although a substantial number are published in both French and English. Relatively few are published in French only. It would appear that the more important general regulations are published in both languages. Internal and staff regulations are normally in English only. French only is used for very local regulations. An English unilingual bias is obvious.

2. Delay between publication in English and French

3.30. Our next question dealt with the delay between publication in one language and the other in those cases where publication took place in both French and English. We distinguished between the two types of regulations: those covered by the Regulations Act but exempted from compulsory publication and those not covered by the Act. With respect to the first category, three departments stated that publication when it took place in both languages was simultaneous, one commented that publication was "generally" simultaneous, and three acknowledged that there was a delay of approximately two to three weeks between the two versions. Concerning rules, orders, and instructions five departments claimed simultaneous publication, one said that publication was "generally" simultaneous, and five said that there was a delay between the two publications. There were a few replies from intermediate agencies, one stating that it did not publish simultaneously regulations exempted from the *Canada Gazette* and, with respect to regulations not covered by the Regulations Act, one agency saying that publication was simultaneous and one that it was not. The replies from boards and commissions were not very explicit either. Two boards stated that they published such exempted legislation simultaneously, and one that it did not. Of the 12 boards replying with respect to regulations not covered by the Act, five said that publication was not simultaneous, and seven that it was. Thus, the only conclusion which can be drawn with some certainty from the replies to this part of the questionnaire is that not only are the majority of regulations which are exempted from compulsory publication in the *Canada Gazette* or which are not covered by the Regulations Act published in English only, but in the comparatively rare cases where publication takes place in both languages, there is some delay between the appearance of the English and the French texts. The matter would have to be studied further in order to obtain more precise information but we had no time to carry out further inquiries.

A. Practices of Provincial Boards and Commissions

3.31. Because Quebec is the only jurisdiction outside the federal government passing subordinate legislation in both languages, we assumed that it would be instructive for purposes of comparison to study the practices of a number of provincial boards and commissions in drafting and publishing their regulations and orders. This was done by means of a questionnaire⁵² as a result of which we received and computed replies from the following 12: Montreal Expropriation Bureau, Workmen's Compensation Board, Quebec Social Allowance Commission, Minimum Wage Commission, Quebec Hydro-Electric Commission (Hydro-Québec), Quebec Municipal Commission, Electricity and Gas Board, Water Board, Quebec Agricultural Marketing Board, Transportation Board, Highway Victims Indemnity Fund, and the Public Service Board.

The 12 boards replying include some of the most important ones and represent a fair sampling of Quebec practices.⁵³ We did not include in our survey government departments but do not believe that the results would vary significantly if they had participated.

3.32. Since Quebec does not have the equivalent of the federal Regulations Act, we could not resort to the categories used to analyze federal regulations.⁵⁴ Consequently, on the basis of known Quebec practices, we divided regulations into the following three types: a) regulations issued directly by the board or commission concerned; b) regulations administered by the board or commission but issued by the provincial cabinet; and c) regulations issued by the board or commission, but requiring cabinet approval.⁵⁵

3.33. Practically all boards and commissions answering stated that the Quebec department of Justice played no role whatsoever in the drafting or revision of subordinate legislation administered by them. One said that its supervising government department played a role in drafting its regulations. Only one declared that drafts were prepared by a department of Justice attorney seconded to its supervising government department.

B. Language of Drafting

3.34. Our inquiry into the language used to draft federal subordinate legislation disclosed that this was practically always English. We found a similar situation in Quebec, although there the language was French.

Concerning the regulations issued by boards and commissions themselves, the six boards replying all stated that the original draft of their regulations was in French. Of the eight boards replying to the question on regulations not published in the *Quebec Gazette*, one drafted some in French and some in English, four drafted all in French only, one drafted some in both languages concurrently but all others in French only, and only two drafted all in both languages concurrently. It would appear that other minor regulations were drafted quite frequently in both languages at the same time. However, in view of the replies to the previous questions we wonder whether our respondents properly understood the meaning of “simultaneously” and did not confuse the drafting and the issuance of regulations.

The working language of the draftsmen of subordinate legislation in Quebec seems to be French, and most Orders-in-Council are drafted in French, except when they are suggested by English-speaking organizations or when they relate to financial matters. All Orders-in-Council which are not published in the *Quebec Official Gazette* are drafted in French only, and this is the version approved by the cabinet. If an English translation is required by anyone, an “unofficial version” or an “office translation” is prepared by the Clerk of the Executive Council.⁵⁶ As we have seen, this practice is similar to that in Ottawa except for the fact that there the language is English. None of the boards and commissions replied to question 13 requesting them to state the reasons for these language practices.

We have seen that an important factor in the choice of language for drafting subordinate legislation is the linguistic background of the legal officers charged with the drafting. Question 18 was constructed so as to determine the number of legal advisers employed by each board and commission and to establish whether or not they had a thorough knowledge of spoken or written French and English. Five boards had no full-time legal adviser. The remaining seven employed a total of 24 lawyers, 22 of whom were described as fluently bilingual in both spoken and written French and English. This is in marked contrast with federal legal draftsmen of whom only 25 per cent were said to be bilingual.

C. How and When Translation Takes Place

3.35. Having established that subordinate legislation in Quebec is generally drafted in French first, we asked who translated the regulations into English and at what stage translation took place. Although most boards declared that their regulations were translated by internal translators, three referred to translations made by employees of the *Quebec Official Gazette*. It would appear that Orders-in-Council which are to be published in the *Quebec Official Gazette* are generally translated in the office of the Queen's Printer and that both versions are official. In other words, it would seem that official

status is given to a translation that has been prepared by government employees but never submitted to or approved by the cabinet! The translators working for the Queen's Printer ensure, among other things, that every document (including notices, proclamations, Orders-in-Council, regulations, rules, and appointments) is translated. Translations from French into English represent about 80 per cent of the work of that office, the remaining 20 per cent being translations from English into French. Most texts are submitted in their original language and translated by an employee under the supervision of the Chief Translation Clerk. Once published, as we shall see, both versions are authentic. The translation office of the *Quebec Official Gazette* encounters the usual technical problems and frequently has to make inquiries with specialists to find the right translation. When it seems particularly difficult to find the exact French equivalent of an English expression, the English term will be given in brackets, for example, "compagnie de portefeuille (holding company)." The office experiences some difficulty with technical translations into English. It makes the usual complaint about the unavailability of trained translators. Furthermore, translators must switch from one area of activity to another and cannot specialize. As with the Bureau for Translations in Ottawa, the tendency in case of doubt is to stick to a literal translation.⁵⁷

3.36. We saw that federal officials were almost overwhelmingly arrayed against simultaneous drafting in both languages. Of the 12 Quebec boards and commissions queried, five declared that they did not foresee any problem; three did not express any opinion. As for the others, they envisaged a variety of problems including "problèmes de traduction," a time factor, and difficulties arising from working on two texts at the same time.

3.37. We queried the boards on whether they found any particular difficulties of interpretation resulting from the existence of subordinate legislation in two versions. Seven stated that they met no problems. One board thought that problems arose only if the two versions were not first co-ordinated. Another one opined that the rare problems which might arise could be solved by the normal rules of interpretation of statutes. A third board felt that some of its decisions might be difficult to translate for technical reasons.

D. Rules Governing Publication

3.38. Quebec does not have any equivalent of the federal Regulations Act. The Provincial Secretary's Department Act provides for the appointment of a Queen's Printer who shall publish the *Quebec Official Gazette*.⁵⁸ Section 28 of this statute states that all publications in the *Quebec Official Gazette* shall be authentic. Article 1207 of the Quebec Civil Code declares to be authentic and to make proof of their contents without any evidence of their official character being necessary, all Orders-in-Council issued by the provincial government, all official documents printed by the Queen's Printer, and all official announcements appearing in the *Quebec Official Gazette* by authority. These laconic provisions obviously do not indicate which regulations must be published and which need not be published. To discover which regulations require publication in the *Quebec Official Gazette* we must turn to the particular statute governing the administra-

tive entity issuing the subordinate legislation. These provisions are scattered all over the Revised Statutes and the more recent bills. Some regulations need to be published in their entirety in the *Quebec Official Gazette*,⁵⁹ while for others it is sufficient that a notice of their approval by the cabinet be published.⁶⁰ Occasionally the statute also stipulates that the publication is to take place in two languages.⁶¹ Frequently, however, there is no provision, although the practice is for all publications of regulations in the *Quebec Official Gazette* to be bilingual.

It should be noted that several other provinces have general statutes requiring publication of their regulations.⁶² Some provinces have general laws dealing with their Queen's Printer and with publication of proclamations, regulations, and notices.⁶³

In reply to the question whether their regulations were published in the *Quebec Official Gazette*, only three boards replied in the affirmative; five said that they were not; and the remaining four stated that the question was not applicable to them. This question was supplemented by queries about the reasons for publishing certain regulations and withholding some others. While the answers were fragmentary and did not provide significant statistics, we noted the following comments:

The law texts as well as the regulations which must appear in the Quebec Official Gazette are published in both languages; the other publications which are mostly internal regulations are drafted in French only. . . . Internal regulations which are not published in the Quebec Official Gazette are drafted in French only.⁶⁴

All our ordinances and regulations of interest to the public are published in both languages in the Official Gazette. . . . Announcements, notices and directives of interest to employers and employees are published in English and French newspapers in the language used by the newspaper.⁶⁵

The latter Commission added that all its ordinances and rules are issued in both languages.

One board said that it published in both languages "the general ordinances regulating public enterprises" and "ordinances establishing tariffs in public enterprises." It publishes in French only: "Ordinances of a private nature concerning or affecting a public enterprise designated under a French name, a provincial municipal corporation or any other institution, even a bilingual one, operating in the province."⁶⁶ Another declared that its rules of practice and procedure were published in both languages, as were the general instructions concerning agreements promulgated by the Board. Yet another commented that it published in both languages its rules of practice as well as its general ordinances and then added: "The Board follows an essentially bilingual policy in that all the laws which it is charged with carrying out and the regulations which it issues, are bilingual. In all its contacts with people who communicate with it, the Board uses the language of its interlocutor."⁶⁷

We were no more successful in trying to elicit significant data as to the delay between the publication of the English and French versions of regulations not published in the *Quebec Official Gazette*. The five boards and commissions replying stated that when such publication took place both versions were published simultaneously.

3.39. Irrespective of publication in the *Quebec Official Gazette*, it would appear that the general tendency of boards and commissions and of the cabinet in issuing regulations is to do so in both languages. Nine out of 12 boards and commissions issue their own

regulations in both languages, although four stated that some of their regulations were in French only, and one even indicated that some of its regulations were sometimes in English only. It should be noted that a board or commission may issue not only bilingual regulations, but also some regulations which are in only one or the other language. Seven of the 12 boards and commissions said that they administer regulations issued by the provincial cabinet. Five stated that these regulations were drafted in both languages; two administer some regulations which exist only in French; another, in addition to bilingual regulations, also administers regulations which exist only in French; and none has regulations which exist only in English.

A. Need for Simultaneous Drafting

3.40. It would appear from section 133 of the B.N.A. Act that under normal circumstances the two versions of a federal or Quebec bilingual statute are of equal authority. Hence, in order to ascertain the law on any subject regulated by a bilingual statute, particularly in the event of ambiguity or conflict, both the French and English versions may have to be consulted. This is why we stressed in the preceding sections the importance of simultaneous and joint publication of the two versions. It may happen, however, that the two versions will read somewhat differently; that is to say, that they will say in effect two different things, which may vary only in degree or which may contradict each other outright. Occasionally one version may contain a vague or ambiguous term or expression while the other version is clear and unambiguous. Or a situation may be encountered in which an English dictionary gives more than one meaning to a particular English word and a French dictionary gives more than one meaning to the word used to translate a corresponding English term. Nevertheless, both these versions purport to state one and the same law and one and the same legislative policy. The question then arises as to just what meaning is to be given to a law which exists in two official but conflicting versions. That this is no mere academic question of semantics but a great practical problem will be evidenced by the illustrations taken from the jurisprudence, an examination of which cannot but emphasize the need for careful and simultaneous draftsmanship in both languages.

B. Statutory Rules of Interpretation in Quebec

3.41. The difficulties posed by linguistic differences in bilingual statutes were appreciated from the very beginning of legislation in both languages in Lower Canada. In 1793, two years after the Constitutional Act had divided what was then Canada into Upper and

Lower Canada, the House of Assembly of Lower Canada adopted the following rules of interpretation:

III. That Bills relative to the *criminal laws* of England in force in this province, and to the *rights of the Protestant clergy*, as specified in the act of the 31st year of his Majesty chap. 31, shall be introduced in the *English* language; and the Bills relative to the Laws, customs, usages and civil rights of this Province, shall be introduced in the *French* language, in order to preserve the unity of the texts.

IV. That such Bills as are presented shall be put into both languages, that those in English be put into French, and those presented in French be put into English by the clerk of the House or his Assistants, according to the directions they may receive, before they be read the first time—and when so put shall also be read each time in both languages—well understood that each Member has a right to bring in the Bill in his own language, *but that after the same shall be translated, the text shall be considered to be that of the language of the law to which said Bill hath reference.*⁶⁸

In 1859, when the statutes of what was then Canada were consolidated, the following rule of interpretation applied: “14. If upon any point there be a difference between the English and the French versions of the said Statutes, that version which is most consistent with the Acts consolidated in the said Statutes shall prevail.”⁶⁹ The rule was repeated verbatim in the Act respecting the Consolidated Statutes for Lower Canada of 1861.⁷⁰ Article 2615 of the Quebec Civil Code, which dates from about the same time, provided the following rule of interpretation in the event of textual conflicts:

If in any article of this Code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing laws, that version shall prevail which is most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention.

One reason for this rule is that the Code is largely a compilation of the laws in force at the time of its promulgation. The commissioners named to codify the laws described the nature of their work in the following terms:

By the act which orders the formation of the code, the Commissioners are required to insert therein the civil laws of *a general and permanent character* actually in force; to exclude from it those which are no longer so, and only to propose in the form of amendments, apart and distinctly, the changes they may think desirable; and they are directed to give the reasons and cite the authorities which have guided them in their decisions on each subject.⁷¹

The commissioners listed after each article the sources they consulted in order to ascertain what was the law upon the point covered by the article.⁷² It is these sources which may be resorted to in order to interpret provisions of the Code where differences exist between the two versions.

It should be noted that certain parts of the Code were drafted first in French and then translated into English while the remaining portions were drafted first in English and later translated into French. More specifically, Books I and II, on persons and property, were

first drafted in French, while Book IV, on commercial law, was drafted in English. In Book III, on the acquisition of right of ownership, the drafting was done in English except for the titles of Successions, Gifts, Marriage Covenants, Suretyship, Privileges, Hypothecs, Registration, and Prescription.⁷³

The commissioners themselves did not draft what is now article 2615. It first appears in the Act respecting the Civil Code of Lower Canada.⁷⁴ In the Schedule of the Act, resolution 217 contains what are now articles 2613, 2614, and 2615 of the Code. This Schedule sets out modifications proposed by the legislature on the drafts submitted by the commissioners. The last article of their supplementary report corresponds to what is now article 2613.⁷⁵

In 1937 an attempt was made to have the French version prevail in cases of differences between the French and English texts of laws which contained provisions similar to article 2615.⁷⁶ Because "the application of the Act 1 George VI, chapter 13, may give rise to friction and problems difficult of solution which it is expedient to avoid," the statute was repealed a year later.⁷⁷

The rule of article 2615 of the Quebec Civil Code was re-enacted practically verbatim in article 2 of the Quebec Code of Civil Procedure. Quebec statutes were revised in 1964. The rule for interpretation of the Revised Statutes in case of discrepancy between the English and French versions is that the text which is most consistent with the consolidated laws shall prevail.⁷⁸ The Medical Act⁷⁹ and the Optometrists and Opticians Act⁸⁰ both state that if there is any difference or diversion between the French and English versions of the statute, the French version shall prevail. These appear to be the only statutory provisions extant in Quebec and they state contradictory rules.

3.42. At the federal level, there is no rule of interpretation analogous to article 2615 of the Civil Code, not even in the Interpretation Act.⁸¹ However, the courts have adopted what in effect amounts to a similar rule that both versions are to be consulted and the intention of the legislator determined.⁸²

3.43. Although, as we have noted, both the English and French versions of bilingual statutes are apparently entitled to equal authority, in fact, only the Quebec courts and the Supreme Court of Canada seem to consult both versions. An informal survey that we conducted by questionnaires early in 1965 leads us to believe that the large majority of judges in provinces other than Quebec almost never examine the French version of federal statutes. The few who do are all French-speaking. In Quebec, on the other hand, the jurisprudence discloses that both versions are consulted quite frequently. The same is true for the Supreme Court which has had occasion, as we shall see, to interpret ambiguous provisions of federal statutes by reference to both versions, and it has done the same thing in deciding Quebec cases.

In the following section the jurisprudential solutions of textual conflicts in bilingual statutes will be reviewed in some detail. We do not claim that our survey of the jurisprudence is exhaustive. The totally inadequate indexing of cases in Canada has hampered our research in this as in many other areas. However, we believe that we have found the leading cases and that they provide a fairly accurate reflection of the attitude of the courts in this respect.

C. Textual Conflicts in Bilingual Statutes

3.44. In the following cases Canadian courts had to consider conflicts between French and English versions of either federal or Quebec statutes:

1. “Public work” or “*chantier public*.” In *The King v. Dubois*,⁸³ the Supreme Court, on a petition of right claiming damages for the death of a passenger in a government automobile, had to decide whether this automobile was a “public work” in the sense of section 19(c) of the Exchequer Court Act.⁸⁴ The French version used the words *chantier public*. The Exchequer Court had decided that the automobile was a “public work.” On appeal, the Supreme Court reversed this judgement after considering the meaning of the word *chantier* used in the French version. It decided—rightly from a linguistic point of view—that *chantier* denoted a defined area and locality and could not include a public service such as a government vehicle. In a similar case, *R. v. Moscovitz*⁸⁵ decided shortly thereafter, the Supreme Court followed its own precedent in the *Dubois* case.

2. “By reason of a motor vehicle” or “*quand un véhicule automobile cause*.” In *Blouin v. Dumoulin*⁸⁶ the trial court awarded damages to the father of a child injured after being struck by the defendant’s vehicle. Since there was evidence of contact between the automobile and the victim, the trial judge applied the presumption of liability found in what was then section 53(2) of the Motor Vehicles Act whose English version read as follows: “Whenever loss or damage is sustained by any person *by reason of a motor vehicle* on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.”⁸⁷

Defendant appealed and claimed, among other arguments, that the French version of this sub-section began with the words: “*Quand un véhicule automobile cause*⁸⁸ une perte ou un dommage . . . ,” (when a motor vehicle *causes* loss or damage) claiming that the presumption could only apply if proof was made that the collision had been *caused* by the automobile. This argument was rejected by the Court of Appeal, and more particularly by Mr. Justice Montgomery thereof. The learned judge compared both versions, remarking, “The two versions of the Act must be read together . . . the word *cause* in the French version must be interpreted in the light of the English version.”⁸⁹ The appeal was rejected.

3. “Personal injury” or “*injurer personnelle*”. In *Robitaille v. Beaupré*,⁹⁰ a married woman claimed damages resulting from an automobile accident without being authorized by her husband to institute the action. Article 1298a of the Civil Code permitted married women to sue without authorization in order to recover damages for “personal injury.” Defendant argued that the action was null and void in view of the absence of authorization because “personal injury” had to be interpreted as being confined to attacks upon the honour and reputation of the woman and did not refer to bodily injuries. Defendant relied upon the French version of article 1298a of the Civil Code in which the words *personal injury* had been mistranslated by *injurer personnelle*, which would normally mean insults. This was indeed a case of poor translation. The court set out to determine which of the two versions of the article would have to apply by referring, not only to article 2615,⁹¹ but also to article 12 of the Civil Code which reads, “When a law is doubtful or

ambiguous, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it was passed." The court consulted the report of the commission which had suggested the enactment of the article.⁹² Since this report directly bore out defendant's contention and since the report had been submitted in French by French-speaking commissioners, the trial judge decided in favour of defendant and adopted the more restricted meaning of the French version.

4. "*Personal wrongs*" or "*torts personnels*." The interpretation of the words *personal wrongs* in article 421 of the former Quebec Code of Procedure (now article 332) has also had to be considered by the courts. This article gives the right to a trial by jury "in all actions for the recovery of damages resulting from personal wrongs." In French the words *torts personnels* are used to translate the words *personal wrongs*. The Supreme Court was called to interpret these words.⁹³ Mr. Justice Brodeur noted⁹⁴ that *torts personnels*, the meaning of which in correct French eluded him, originated in a literal translation from an English statute of 1785 in which the words *personal wrongs* first appeared. Furthermore, trial by jury in civil cases was an institution derived from English law. Hence, to find the proper interpretation of the French words *torts personnels* he turned to the English authorities to determine the meaning of the English counterpart and decided the point at issue on that basis. The learned justice pointed out that the meaning of the words *personal wrongs* had been considered previously by several tribunals, but that they had never had to consider both versions.

5. "*At its pleasure*" or "*à sa discrétion*." In *Davis v. The City of Montreal*,⁹⁵ Davis, who had been employed by the City of Montreal as Superintendent of Water-Works for three years, and had been dismissed by resolution of the city council, sued in damages for wrongful dismissal. He was successful in the Superior Court. On appeal, ultimately to the Supreme Court, the latter compared the English text of the city statute⁹⁶ which empowered it to employ persons to work for it and added that the city council "may . . . at its pleasure remove any such officer and appoint another in his place." Davis argued unsuccessfully that the French version of the words *at its pleasure*, namely *à sa discrétion*, meant something different. The court ruled that both versions indicated the clear intention of the legislator to give wide arbitrary powers to the city council.

6. "*Land damages*" or "*préjudice à ces terres*." In *Stevenson v. Canadian Northern Railway Co.*,⁹⁷ the railway company, acting under authority given to it under the Railway Act,⁹⁸ erected a snow fence on the property of Stevenson. As a result a large snowbank accumulated which melted in the spring. The water retained by the soil after melting prevented Stevenson from seeding his land at the proper time and thereby reduced the yield of his crops. Stevenson sued claiming "land damages" under the Railway Act. After failing in the lower court, he succeeded before the Manitoba Court of Appeal. Two of the three judges of the majority decided in favour of Stevenson after consulting the French version of the relevant section of the Railway Act. Indeed, while the English version allowed the railway to erect snow fences on property belonging to others and adjacent to the railway line "subject to the payment of . . . land damages," the French version was "sauf paiement d'une indemnité dans le cas de préjudice à ces terres" (subject to the payment of an indemnity in the case of anything prejudicial to the use of his land). Mr. Justice Richards commented,⁹⁹ "I understand it [the French version] to mean that

the railway company will compensate the owner or other person entitled to the use of the lands for any loss caused by interference with his use of it." This he took to include damages occasioned by loss of crops because of inability to sow at the proper time, which had been the case here. Damage to the soil itself was not the only element to be considered in evaluating damages to be compensated.

7. "*Business or calling*" or "*exercer aucun négoce ou métier.*" In *The King v. Charon*,¹⁰⁰ the accused was charged with violating the Quebec Sunday Observance Act¹⁰¹ because he had shown a motion picture on a Sunday against payment of an admission fee. The Act forbade the pursuit of any business or calling on Sunday. The corresponding French words read "*exercer aucun négoce ou métier.*" The accused was acquitted because the court followed the rule that when a penal statute is interpreted, the interpretation must be that most favourable to the accused. In this case, the French version of the statute, being narrower in scope than the English version, the accused was entitled to benefit from the French version. The court held indeed that "*exercer un négoce*" meant to trade in goods and chattels and that "*exercer . . . un métier*" meant earning a livelihood by manual labour. The showing of motion pictures could not be characterized as either "*un négoce*" or "*un métier.*"

8. "*Conditions of employment*" or "*conditions de travail.*" In *Price Bros. & Co. Ltd. v. Letarte et al.*¹⁰² the Quebec Court of Appeal was faced with the problem of interpreting the Quebec Labour Relations Act¹⁰³ in which the words *conditions of employment* were rendered in French by the phrase *conditions de travail* whenever they appeared. A union and the company for which its members worked were unable to agree on a voluntary revocable check-off of union dues from the wages of the employees which the union requested and the company refused. When negotiations for a collective agreement failed, the minister of Labour appointed a conciliator. When it appeared that the conciliator had been unsuccessful also, a council of arbitration was appointed pursuant to the Quebec Trade Disputes Act.¹⁰⁴ The company then contested the jurisdiction of the council on the ground that the check-off clause in dispute was neither a *condition of employment* nor a *condition de travail* which was the only kind of matter the council could consider. The court decided that the statute as a whole should be looked at to determine the meaning of the phrase. It examined the purpose of the Act, namely facilitating the negotiation of agreements between employers and employees, and proposed to interpret the Act so as to give full effect to that intention. The court held that the unduly narrow interpretation given by the company would include only actual physical conditions under which the work was done and conditions of employment would be restricted to rates of pay and hours of work stipulated at the time the workman was employed. This, the court further held, was not in conformity with the intention of the legislator.

9. "*Superior Judge*" or "*Juge de la Cour Supérieure.*" The 1857 Controverted Election Act gave jurisdiction to a "Superior Judge." The French version spoke of a "Juge de la Cour Supérieure." The matter was raised in two cases before the Superior Court¹⁰⁵ and a suggestion was made that there was a contradiction between the two versions. The court disagreed and referred to the intent and meaning of the law.

3.45. When a text of law is based upon, or consolidates, earlier laws, the court will consult them when the new text itself is not clear.¹⁰⁶ This the courts are enjoined to do

by the first part of article 2615 of the Civil Code. "If in any article of this Code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded. . . ." This article applies only to the Civil Code. However, other Quebec statutes contain similar rules,¹⁰⁷ and these are relied upon by the courts as authority to consult sources of the statute.¹⁰⁸ Occasionally the courts apply the rule implicitly, without mentioning it, but referring apparently to the source of the law being interpreted.¹⁰⁹ When the existing law has been *changed*, article 2615 of the Civil Code directs the courts to apply that version of the article which is most consistent with its intention. In order to ascertain this intention, the "ordinary rules of legal interpretation shall apply." It has been left to the courts to formulate these "ordinary rules" for the interpretation of the Code. The rules so established have then been extended to the interpretation of other bilingual statutes. In penal statutes, we have seen that the rule is that when two interpretations are possible, that which is most favourable to the accused shall prevail.¹¹⁰ Where one version of a statute is inaccurate, doubtful, or ambiguous and the other text of the section is clear, the clear version is applied.¹¹¹ Where the two versions are clearly contradictory they nullify each other.¹¹²

D. Interpretation of Subordinate Legislation

3.46. Administrative law and subordinate legislation also are fraught with interpretative problems,¹¹³ but basically the rules of interpretation for subordinate legislation are the same as those for statutes. Two cases will illustrate this assertion. In *Cameron v. Filion et al.*,¹¹⁴ the Ontario High Court ruling that an act is to be interpreted so as to achieve its object and so as to give effect to all its provisions, considered irrelevant a minor difference between the definition of the French word *bail* and the English *lease* in an order of the Wartime Prices and Trade Board. The Court pointed out that the slightly more narrow definition of the French term was intended to apply only in Quebec because of Quebec law. In *Filion v. Grenier*,¹¹⁵ an action for wages taken by a janitor of a rooming house was dismissed because the ordinance of the Minimum Wage Commission he invoked was held to apply only to apartment houses and not to every business which might fall within the wider French version of the term *maison de rapport*. The Court held that although a rooming house might fall under the definition of a *maison de rapport* it was not an apartment house.

Sometimes special provisions dealing with rules of interpretation are to be found in the subordinate legislation itself. For instance, section 1 of the by-laws of the Corporation of Psychologists of the Province of Quebec¹¹⁶ defines "official languages" as follows:

All By-Laws and the Code of Ethics of the Corporation shall be in both French and English as official and equivalent texts. All other official transactions of the Corporation (including Minutes of all General and Special Meetings, Minutes of all Council Meetings, and reports of Committees to the Council) shall be official in the French language, but an unofficial translation in English shall be provided for members of the Corporation.

All motions at Council Meetings, General and Special Meetings of the Corporation shall be presented in equivalent forms in both languages.

On the other hand, by-law 90 of the Province of Quebec Association of Architects¹¹⁷ stipulates that in the event of conflict between the French and English versions of the by-laws, the French one is to prevail.¹¹⁸

Obviously, if two languages enjoy official status and legislation must be bilingual, preference cannot be given to one of them without reducing the other to a lesser status. The common-sense rule is that stated in article 2615 of the Quebec Civil Code and applied by the courts to other statutes as well: to look for the meaning most consistent with the intention of the legislator.

A. Introductory Remarks

4.01. In this chapter we consider the legal and practical problems resulting from the administration of justice in two languages. Chapter V will be devoted to a study of mixed juries. Chapters VI and VII will deal with the operations of federal and provincial quasi-judicial boards which also have to render a form of justice in two languages. As will be seen, bilingual justice presents a multitude of difficulties, none of which is insoluble however.

We have not examined in detail the question of linguistic qualifications of the judiciary and the bar. Unfortunately, we had neither the time nor the means to do so within the scope of this research project. The problem is not too serious in Quebec where most lawyers and judges have a knowledge of both languages which can vary from merely adequate to excellent. But it can arise within federal tribunals, the members of which are only occasionally appointed from the Quebec Bar, and in the various other jurisdictions where, as we shall see, justice must be rendered in both French and English. Obviously, outside Quebec, a knowledge of French cannot be taken for granted. Thus a satisfactory system of interpreters is essential if justice is to be truly bilingual in Canada. Naturally, the ideal would be that all participants in judicial proceedings know both languages thoroughly so that no interpretation would be needed. But this is utopian. Even when the law permits the parties to use either language in their written proceedings or in addressing the court, such right is effectively nullified if the language used is not understood by the other parties and by the bench, either from personal knowledge or through translation and interpretation. This is why we have paid a great deal of attention to the systems of interpretation existing in the various provinces.

Our survey, incomplete though it was, has led us to the inescapable conclusion that the training, screening, and availability of interpreters are completely inadequate in Canada. Furthermore, since most court proceedings have to be recorded, either by stenography or by some mechanical means, we have also alluded to the problems arising from the lack of

linguistically competent court stenographers. While a much more widespread knowledge of both languages is the prerequisite for truly bilingual justice, we do not think that even a first step can be taken towards rendering our justice more bilingual than it presently is without great improvements in the system of interpretation and recording of court cases. We also recommend that further research be undertaken to determine what other factors, if any, militate against the use of either of Canada's official languages where it is permissible. There is evidence that parties or their counsel will often proceed in a language other than their own for psychological or tactical reasons; this problem should be investigated in depth.

B. Bilingual Justice: Historical Background

4.02. We have reviewed in Chapter I the chequered history of bilingual justice in Canada. Its highlights can be summarized as follows.

During the period immediately following the cession, no text of positive law gave the French language an official status, but neither was there any text of law which abrogated its use or replaced it with English as the official language of the colony. Indeed, article XLV of the Articles of Capitulation of Montreal shows that it was the intention of the British to retain the records, all in the French language, of the courts of the former regime.¹

4.03. On January 16, 1760, General Murray issued a commission in the French language to Sir Jacques Allier, making the latter a civil and criminal judge.² Allier was the first French-Canadian judge under British rule. The British authorities also entrusted the administration of justice in the districts of Montreal and Trois-Rivières to French militia officers.³ They thereby insured that disputes would be tried by inhabitants who would understand the language of the litigants. French-Canadian clerks, bailiffs, and other French-speaking assistants were appointed as officers of the courts.⁴ Except when both parties to a suit spoke English as their native tongue, proceedings were conducted almost wholly in the French language.

4.04. The Ordinance of Judicature of September 17, 1764 barred French Canadians from the bench.⁵ This provision was inspired by the anti-Papacy policy adopted by the British. However, as a matter of expediency, French Canadians were admitted to serve on juries in the Court of King's Bench, even though in England only Protestants were so admitted. French-Canadian advocates could practise in the Court of Common Pleas only, even though in England Roman Catholics were barred under the Test Act from membership in the legal profession. Governor Murray made the following observation on these provisions of the ordinance: "We thought it reasonable and necessary to allow Canadian Advocates and Proctors to practise in this Court of Common Pleas only (for they are not admitted in the other Courts) because we have not yet got one English Barrister or Attorney who understands the French language."⁶ French Canadians were permitted by the same ordinance to serve as bailiffs.

4.05. In the Court of King's Bench all proceedings were carried on according to English law. In the Court of Common Pleas the proceedings were drawn up sometimes in

French, sometimes in English, depending upon the language of the lawyer who prepared them. They were most often in the French language, since much of the business in the Court of Common Pleas was carried out by French-Canadian advocates. But this Court was intended as a temporary expedient to give way to English-language courts once the French-Canadian inhabitants had become accustomed to English and English law.⁷

4.06. As a result of the "Presentments by the Protestant Grand Jurors of Quebec" and the reply of the French-Canadian jurors,⁸ the report of the Committee for Plantation Affairs concluded that not only should Canadians be permitted to practise in every court, but all magistrates should understand the French language.⁹ The new Ordinance of Judicature, dated July 1, 1766,¹⁰ allowed Canadians to practise in all jurisdictions but said nothing with respect to magistrates.

4.07. In an Ordinance for the more effectual Administration of Justice and for Regulating the Courts of Law in Quebec, dated February 1, 1770, it was provided that plaintiff's declaration could be either in French or in English.¹¹

4.08. The Quebec Act wiped out the Proclamation of 1763 and all the ordinances of the Governor and Council of Quebec relative to civil government and administration of justice.¹² The ordinance of February 25, 1777, re-established the courts of civil judicature. This ordinance provided that writs of summons be in the language of the defendant.¹³ It also reintroduced mixed juries but only for civil cases. Mixed juries were not allowed in criminal cases until 1787.¹⁴

4.09. On January 29, 1788, the Quebec Court of Appeal decided that all reasons for appeal should be in both languages.¹⁵

In 1787 official translation services were begun in the courts.¹⁶ In Lower Canada under the Constitutional Act the administration of justice was carried on in both languages. Also there was a provision for a French translator in the Court of King's Bench. An 1801 statute repealed the 1785 Act which required that summonses be in the language of the defendant.¹⁷

4.10. In 1794 Upper Canada passed an Act to establish a Superior Court of Civil and Criminal Jurisdiction and to regulate the Court of Appeal¹⁸ which provided that notices attached to processes served on French-Canadian defendants were to be written in the French language. But on March 27, 1839 the legislature of Upper Canada passed a resolution making English the only language to be used before all courts of justice and in all public documents in the province.¹⁹

4.11. The Act of Union left untouched the status of languages in the courts. In the Lower Canada Administration of Justice Act of 1841 it was provided that summonses were to be issued in either language.²⁰ In an Act of 1843 relating to the administration of justice, it was provided that all writs and processes from the Court of Queen's Bench were to be in both languages.²¹ Furthermore, where personal service of the defendant was not possible, notice to appear was to be printed twice in an English newspaper and twice in a French newspaper. Writs from the Court of Appeal were to be in both languages. An 1846 act provided that the language to be used in proceedings was at the option of the parties.²² In 1849 the Act Respecting the Court of Appeals was repealed and the Court of Queen's Bench for appeals and criminal matters was set up.²³ Writs and processes issuing from this court were to be in either the English or French language. In the original

Civil Jurisdiction Act of 1849 it was provided that either language could be used in summonses and that notice to appear for an absent defendant was to be printed in both languages. The Superior and Circuit Courts Act of that year required bailiffs to speak either English or French. The Bar Act contained a similar provision with respect to members of the Bar. The Superior and Circuit Courts Act also provided for the services of a translator.²⁴

Pre-Confederation statutes in Quebec reflect the bilingual character of justice in the province. When provision is made for summoning absentees by newspaper advertisements,²⁵ or for notice of a sale of movable property seized in execution,²⁶ or for the issue of Writs of Prohibition,²⁷ the law requires that such notices be published in both languages either in specified newspapers or by the appropriate posting.

4.12. In the district of Assiniboia in the West there was a fairly substantial French-speaking population. After an incident in 1849 over the refusal of a recorder to speak French in his court, a meeting of the Council of Assiniboia ruled that judges were to be bilingual.²⁸ French-speaking personnel were employed in the courts of Assiniboia.

4.13. In the period from 1870 to 1890 both languages were used in the Manitoba courts²⁹ and in 1895 the Queen's Bench Act made provision for interpreters.³⁰

4.14. In 1877 the Northwest Territories Act was amended to allow for the use of both languages in the courts.³¹ The courts of the Northwest Territories are still officially bilingual.³²

C. Bilingual Courts

4.15. Section 133 of the British North America Act reads in part: "Either the English or the French language . . . may be used by any person or in any pleading or process in or issuing from any court of Canada established under this Act, and in or from all or any of the Courts of Quebec." In the following pages we shall examine which are the courts of Canada which must be bilingual and enumerate the "Courts of Quebec."

1. Federal courts

4.16. The following appear to be "courts of Canada" which are governed by section 133 of the B.N.A. Act:

a) *The Supreme Court.* Section 101 of the B.N.A. Act gives Parliament the right to constitute "a General Court of Appeal for Canada" and to establish additional courts for the better administration of the laws of Canada. The general court of appeal for Canada is the Supreme Court which obviously falls within the ambit of section 133 of the Act. Of the nine judges who comprise the Supreme Court, three must come from the Bar of the province of Quebec.³³ By convention, two of these three judges are French-speaking. When cases are appealed from courts in the province of Quebec, two of the Quebec judges must be present at the appeal or be replaced by an *ad hoc* appointment from the Quebec Court of Queen's Bench or Superior Court.³⁴ Naturally lawyers are allowed to plead before this court in either language. The choice is determined by a variety of factors,

including the mother tongue of the barrister concerned or the language of the particular judge to whom a reply or remark might be addressed. The judges from Quebec usually write their opinions on Quebec cases in French, in which language they then appear in the official Canada Law Reports. The headnotes of cases in which such French opinions have been given summarize those opinions in French, although until recently these summaries had been published in English only.³⁵

b) *The Exchequer Court*. There is no specific provision in the Exchequer Court Act³⁶ with respect to French-speaking judges or judges from Quebec. However, judges in this court on occasion have written opinions in French, which the Canada Law Reports have reproduced in that language. Only recently, however, have summaries of those judgments been rendered in French as well as English.³⁷ It should be noted that the Exchequer Court also constitutes, or exercises the jurisdiction of, the Court of Admiralty³⁸ and the Prize Court,³⁹ so that section 133 of the B.N.A. Act applies to it as well. The rules of neither court contain any provision dealing with language.

c) *Courts martial and military courts*. Part VII of the National Defence Act⁴⁰ sets up a hierarchy of service tribunals ranging from summary trials by commanding officers or superior commanders to general, disciplinary, and standing courts martial. Part IX⁴¹ establishes a Court Martial Appeal Court. In our opinion, all these courts are governed by section 133 of the B.N.A. Act.

According to F. Eugène Therrien, a member of the Royal Commission on Government Organization, bilingualism in the Armed Forces of Canada is virtually non-existent.⁴² It is probably equally rare in courts martial, but we have not investigated the actual conduct of courts martial since they were beyond our terms of reference. It must be noted, however, that Canada's military law provides for interpreters when required in service proceedings.⁴³

d) *Senate divorce commissioner*. The Senate still hears divorce cases from Quebec and Newfoundland. An officer of the Senate hears evidence in these cases and subsequently reports his findings to the Senate together with his recommendations as to the disposal of the case.⁴⁴ He is a judge of the Exchequer Court who has been granted leave of absence for this purpose by the Governor-in-Council.⁴⁵ Whether this officer constitutes a court or not is a moot legal point. However, although it is not clear that he constitutes a court and hence falls under section 133 of the B.N.A. Act, proceedings before him are in fact bilingual, especially since the overwhelming majority of cases heard emanate from the province of Quebec. Section 157 of the Standing Rules and Orders of the Senate of Canada relating to resolutions for the dissolution or annulment of marriage⁴⁶ provides for notices of petitions for resolutions dissolving or annulling a marriage to be published in the *Canada Gazette*. The language of such notice is not stipulated and it is sufficient that a notice be printed in either French or English. Before 1963, the notices were printed in both languages in the *Canada Gazette* and also had to be printed in daily newspapers.

e) *Provincial courts designated as federal courts*. Several federal statutes designate specific provincial courts to try disputes or offences arising under their provisions. For instance, section 2(10) of the Criminal Code designates which provincial magistrates or courts are endowed with the jurisdictions of a "court of criminal jurisdiction" while

section 2(38) defines which specific provincial courts qualify as "superior courts of criminal jurisdiction." Similarly, the Bankruptcy Act⁴⁷ invests designated provincial courts "with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act." The Canadian Citizenship Act⁴⁸ provides that the cabinet may "designate any court or person in any part of Canada to act as a Court for the purposes of the Act" or "any officer of the Canadian Forces outside of Canada to act as a Court" for the purpose of dealing with applications for citizenship by persons serving abroad in the Armed Forces of Canada.⁴⁹

"Court" is defined in section 2(h) as "any superior, circuit, county or district court and includes in the province of Quebec, any district magistrate and any court or persons designated" pursuant to a federal Order-in-Council. In other words, while the Canadian government can *create* citizenship courts, it normally designates existing provincial courts, or members of the bench thereof, to exercise the jurisdiction of the citizenship court entrusted with deciding whether or not to recommend to the minister that an applicant for citizenship "is a fit and proper person."⁵⁰

Parliament has not created distinct entities, but has attributed the function of a criminal or citizenship or bankruptcy court to existing provincial courts. The constitutional position of these designated courts is not entirely without ambiguity. Are they governed by section 133 of the B.N.A. Act? A literal interpretation of this section would seem to preclude such reading, except, naturally, in Quebec. Section 133 applies to "any Court of Canada *established* under this Act." Strictly and narrowly speaking, there is a difference between the designation of an existing provincial court to exercise a specific jurisdiction and the establishment or creation of a tribunal. On the other hand, the designation of a provincial court is only a device to avoid the expense and practical difficulties resulting from a multiplicity of tribunals. Parliament could create independent criminal or bankruptcy courts if it saw fit. It could be argued that the spirit or intent of the constitution is such that both languages should be admissible before any court in Canada exercising federal jurisdiction, no matter which legislative body was responsible for its actual creation. This is obviously an impractical and utopian point of view in the present circumstances. It would be unreasonable to claim the right to conduct proceedings in French before the Supreme Court of Judicature of Prince Edward Island for instance, or before an Alberta magistrate, but from a purely technical point of view the argument is not totally absurd and could be pressed, albeit probably without success. Furthermore, if a real need ever arose for bilingual criminal justice or simply bilingual federal justice and if it were to include all areas within the jurisdiction of Parliament, it might be simpler to create special federal courts with their own procedure and qualified personnel rather than burdening existing provincial courts with a task which they cannot possibly fulfil. We are not aware of any conclusive judicial pronouncement on the subject and only raise these questions because they underline the ambiguities and insufficiencies of section 133.

f) *Courts in the Northwest Territories.* Section 20 of the Northwest Territories Act⁵¹ created a territorial court appointed by the federal government. This court has civil and criminal jurisdiction throughout the Territories.⁵² In civil cases, an appeal lies from the

territorial courts to the Court of Appeal for the Territories, which is composed of the Chief Justice of Alberta, the Justices of Appeal of Alberta, and the judges of the territorial courts of the Northwest Territories and of the Yukon.⁵³ As these courts are created by an act of Parliament, it is our opinion that section 133 of the B.N.A. Act applies to them and that French or English may be used in any pleading or process before them. We are also inclined to believe that either language may be used before the police magistrates provided for in the Northwest Territories Act⁵⁴ who exercise the powers of a justice of the peace or of any two justices of the peace and who are vested with certain civil jurisdictions.

g) *Courts in the Yukon.* The Yukon Act⁵⁵ created a Territorial Court of the Yukon Territories⁵⁶ and made provision for police magistrates with powers identical to those in the Northwest Territories.⁵⁷ In our opinion, an equally plausible case may be made for the application of section 133 of the B.N.A. Act to these courts in the Yukon.

2. *Courts in Quebec*

4.17. Under section 133 of the B.N.A. Act all Quebec courts are bilingual. These include the Superior Court, the Provincial Court (formerly Magistrate's Court), the Court of Appeal (Court of Queen's Bench, Appeal Side), the Court of Sessions of the Peace, the Municipal Courts of Montreal and Quebec,⁵⁸ and the Court of Queen's Bench, Crown Side, which is the superior court of criminal jurisdiction in Quebec.⁵⁹ If section 133 of the B.N.A. Act is to be interpreted broadly we should even venture to say that the words "all or any of the Courts of Quebec" encompass all other provincial tribunals and more particularly all municipal courts in the province. The status of the Highway Safety Board (Tribunal de sécurité routières)⁶⁰ and of the Quebec Mining Judge (Juge des mines)⁶¹ is not clear. Are they courts in the traditional sense falling within the scope of section 133 of the B.N.A. Act or are they merely quasi-judicial boards which are not governed by the Act?⁶² The Highway Safety Board is composed of three district judges appointed by the provincial cabinet⁶³ to hear appeals from decisions of the Director of the Motor Vehicle Bureau of the province, suspending, cancelling, or refusing to suspend, cancel, or issue a permit or certificate of registration.⁶⁴ Since this is essentially an appeal from an administrative decision, it might be argued that the Highway Safety Board is really a quasi-judicial entity rather than a court. The Mining Judge is also a district judge appointed by the provincial cabinet, but his jurisdiction seems to be somewhat more "judicial" in the traditional sense:

The Mining Judge shall have, to the exclusion of any other court, jurisdiction over all litigation respecting any rights, privileges or titles conferred by this act or any regulation, or under this act or any regulation.

In particular, the Mining Judge shall have jurisdiction, to the exclusion of any other court, over all litigation respecting:

(a) the existence, validity or forfeiture of any prospector's licence, claim, development licence, exploration licence, operating lease, mining concession, mining lease, special licence or exploration permit;

(b) the perimeter, boundaries and extent of the land covered by any of the above mentioned titles.⁶⁵

On the other hand, he also hears administrative matters:

The Mining Judge shall have jurisdiction over all matters within the competence of the Minister under this act:

- (a) By way of appeal in cases where an appeal lies;
- (b) Upon a reference by the Minister in any other case where the Minister deems it expedient.⁶⁶

An appeal lies from the decisions of the Mining Judge to the Quebec Court of Appeal: "Save where otherwise provided, an appeal shall lie to the Court of Queen's Bench sitting in appeal, in accordance with the rules of the Code of Civil Procedure, from any final decision of the Mining Judge."⁶⁷

Section 133 of the B.N.A. Act is far from clear, and its scope might depend on what interpretation is given to the word *court*, but there is nothing in the act limiting the application of this word to superior tribunals.

Proceedings in Quebec courts have traditionally been conducted in both languages. The Summary Convictions Act, which governs all penal proceedings in the province (that is, those resulting from violations of provincial statutes or municipal by-laws)⁶⁸ does not contain a single pertinent provision. All 41 forms annexed to the statute, however, are given in both languages. Proceedings in the Quebec Court of Appeal, the Superior Court, and the Provincial Court (formerly Magistrate's Court) are governed by the Code of Civil Procedure which was revised in 1965. The new Code contains a number of pertinent provisions but also some changes from the old Code in this respect. For instance, article 118 of the former Code, which applied to the Superior Court and the Provincial Court and stated that writs of summons could be drawn up either in French or in English, has been redrafted into section 111 of the new Code without any reference to language, no reason being given for the change by the Commissioners. Article 135a, which provided for publication of a synopsis in French and English of the order of a judge permitting service of a real action by newspaper in some cases of succession, and article 136, covering similar service of writs on absent defendants, have been modified. Article 139 of the new Code provides:

Service by public notice of a writ of summons is made by publication of an order of the judge or prothonotary, calling upon the defendant to appear within a delay of thirty days or such other delay as may be fixed, and informing him that a copy of the writ and declaration has been left for him at the office of the court.

Unless the judge has otherwise directed, the order must be inserted twice, with an interval of less than a month, in French in a newspaper published in that language and in English in a newspaper published in that language, if such newspapers are published in the locality where the defendant is required to appear. If all the newspapers there are published in one only of such languages, the notice must be inserted in both languages in the same newspaper. If no newspaper is published there in French or English, the notice is inserted in a newspaper published in the nearest locality, according to the same rules.

The judge or prothonotary who makes the order designates the newspapers in which publication must be made.

The same rules are followed, with any necessary modifications, for the service by public notice, when it is required, of any proceeding other than a writ of summons. . . .

Article 136 of the new Code, which covers the service in Quebec of proceedings issued by foreign tribunals, declares that a true copy of such proceedings can be served on the defendant when it is drawn in French or in English, but that it must be accompanied by a certified translation if it is in another language. The rules of practice of the various Quebec courts which have adopted them⁶⁹ do not contain any pertinent provision. The Criminal Court of lower jurisdiction has not adopted any rules of practice.

3. Other provincial courts

4.18. We have seen⁷⁰ that some doubt exists as to whether the courts of Alberta and Saskatchewan are technically only English and that a technical argument can be made for the right to use French in pleadings or processes in or issuing from their courts.

New Brunswick may soon provide for a limited right to conduct trials in a language other than English since at the time of writing it is considering modifying the Evidence Act⁷¹ by inserting the following section 23C: "In any proceeding in any Court in the Province, at the request of any party, and if all the parties to the action or proceedings and their counsel have sufficient knowledge of any language, the judge may order that the proceedings be conducted and the evidence given and taken in that language."⁷²

4.19. Earlier we concluded that the courts of the Northwest Territories and of the Yukon, being constituted by Parliament, fell within the operation of section 133 of the B.N.A. Act. The function of these courts is to administer the laws of Canada and the local ordinances. Federal jurisdiction to create them can thus be found in section 101 of the B.N.A. Act. However, if the Northwest Territories or the Yukon were granted the status of a province with the right to constitute their own courts, we believe that they could abrogate section 133 of the B.N.A. Act, which does not apply to provincial courts except those in Quebec. If Parliament, instead of creating special federal courts, designated such provincial courts to administer federal law, there would be no constitutional grounds to require bilingualism in the courts of the new provinces.⁷³ In other words, section 133 cannot apply to courts created by any province other than Quebec.

4.20. As we shall see in Chapter V, section 536 of the Criminal Code provides for the right of a French- or English-speaking accused to request trial by a jury at least half of whose members speak his language. The Criminal Code does not indicate whether proceedings before such a mixed jury can be conducted in both languages, and to our knowledge the point has not been raised in any reported decision. Since the Manitoba Court of Queen's Bench is a provincial court, section 133 of the B.N.A. Act does not apply to it, and we have seen⁷⁴ that French is no longer an official language in Manitoba. The implication of the Criminal Code's recognition of the right to mixed juries in Manitoba⁷⁵ is that in a mixed jury trial the accused is entitled to demand that all the evidence be translated in both languages, counsel can address the jury in both languages, and the judge can charge the jury in both languages. Despite the absence of relevant reported jurisprudence in Manitoba, we do not see any reason why these rules which have been recognized by the Supreme Court of Canada do not apply to the Western provinces as well.

D. Court Interpreters

1. The need for interpreters

4.21. The conduct of justice in two languages is intimately bound up with the availability of competent interpreters. The right to an interpreter means both the right to be able to testify in one's own language and the right to understand proceedings conducted in a language other than one's own. Admittedly, the right to interpretation is not peculiar to a bilingual or multilingual country and could be invoked by anyone who does not understand the language of the forum. An accused tried in an American court who understands only Japanese is obviously entitled to have the evidence against him or on his behalf translated into the language he understands and is also entitled to testify in Japanese and have his testimony translated. A witness in a civil proceedings who does not speak the language of the court is normally allowed to testify in his own tongue and his testimony is translated for the benefit of the tribunal. In a bilingual system of justice, where two languages are official, a party to judicial proceedings not only possesses the rights we have just outlined, but could demand, even in civil proceedings, to have the entire trial translated for him if he speaks one of the two official languages and the court uses the other. Furthermore, the unchallenged right to interpretation and the availability of competent interpreters reinforce the right of a party in legal proceedings to conduct his case in the language he understands best. Thus, while interpretation is not synonymous with bilingual justice, it is often a condition *sine qua non*.

If any proof is needed of the necessity for competent and readily available interpreters, it can be found in a number of incidents reported in the newspapers during the last few years. In a criminal case in Pembroke, Ontario,⁷⁶ the court refused to admit a confession by a Montreal man of possession of a stolen television set. The case against him was dismissed. Magistrate S.C. Platus ruled that the suspect spoke French more fluently than English and that Pembroke Police Chief Bert Dickie, who took the purported confession, would have had difficulty in communicating with the suspect. The court recommended that "provision should be made for having French-speaking suspects questioned here [that is, in Pembroke] in their own language as Pembroke is only five miles from Quebec border. . . . They [the suspects] should be questioned in French, Polish or whatever language they best understand."

In another fairly recent criminal case, this time in Ottawa, a French witness encountered difficulty in testifying in French before the Ontario Supreme Court.⁷⁷ Upon hearing the witness's request, the presiding judge asked her whether she spoke English. She replied that she did but that she wished to speak French. The judge ordered her out of the witness box commenting that French was not an official language in Ontario. When the court resumed, the judge had changed his mind and allowed the witness to testify in French since there was "nothing objectionable" about this. The judge explained that "she spoke in English before the grand jury and when a man is being tried for one of the most serious offences [murder] this court should not be turned into a theatre of any kind." The witness was quoted as explaining to newspapermen: "When I first talked to the grand jury I spoke English because I didn't realize interpreters were provided. Then I met the

interpreter before I entered the Supreme Court the next day and I spoke to him. When I entered the witness box, I saw the interpreter sitting in front of me, and of course wanted to use him. . . . I express myself more accurately in my own language. When the future of a boy may hang on what you say, you must say it in the best and most careful manner you're capable of." In the case of former government official Raymond Denis, one of the grounds raised by the accused's counsel for demanding a change of venue from Ottawa to Montreal was the allegation that "court facilities do not measure up to" carrying on the proceedings through translation.⁷⁸ The trial of Raymond Denis was also delayed by the lateness of the English transcript of the evidence given at the Dorion Inquiry.⁷⁹

2. Right to interpretation

4.22. Considerable recognition of the right to an interpreter in judicial proceedings can be found in the statutes of Parliament and of the various provincial legislatures as well as in the rules of court. The general principles enunciated above are thus generally admitted in Canada. For instance, the Canadian Bill of Rights stipulates that no act of the Parliament of Canada shall be construed or applied so as to "deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted."⁸⁰ The Bill of Rights applies only "to matters coming within the legislative authority of the Parliament of Canada."⁸¹ There is thus no doubt as to the right to interpretation before any federal tribunal, commission, board, or court. The situation is not as clear with respect to provincial courts applying federal statutes since the application of the federal Bill of Rights to the conduct of proceedings in a provincial court is not well defined, particularly when a provincial court deals with a federal matter only incidentally. Specific references to the right to have an interpreter are to be found in other statutes.⁸² The Visiting Forces (North Atlantic Treaty) Act⁸³ ratified the North Atlantic Treaty, of which article VII(9)(f) provides that whenever a member of the force or civilian component or dependent is prosecuted under the jurisdiction of a receiving state, he shall be entitled "if he considers it necessary, to have the services of a competent interpreter."⁸⁴ Provisions for interpreters to enable prospective voters to communicate with the returning officers are also to be found in the Canada Election Act⁸⁵ and in the Canada Temperance Act.⁸⁶ Also, provisions dealing with interpreters are found in a number of federal regulations.⁸⁷

Most of the provinces, with the exception of Newfoundland and Prince Edward Island, have statutory provisions for interpretation if a prospective voter does not speak the language of the returning officer.⁸⁸ In addition, some provinces have specifically recognized the right to interpretation before the courts,⁸⁹ or have provided for the payment or employment of interpreters by the courts.⁹⁰ However, apart from the occasional clear-cut recognition of the right to an interpreter in such statutes as the Bill of Rights, the Visiting Forces (North Atlantic Treaty) Act, and the Quebec Code of Procedure, the legislator seems to take the institution for granted and deals with it only in passing or incidentally. As a result of this legislative silence, it has been left to the courts to

determine the extent of this right and to stipulate the conditions of its exercise. They have held that there is no absolute right for anyone to have an interpreter: the judge has discretion to decide according to the circumstances.⁹¹ The Ontario Court of Appeal has said: "There is, moreover, much to be said in favour of the view that there is no inherent right in any foreigner that the proceedings taken in our Courts shall be made wholly intelligible to him, even though he should be charged with crime, and at a reasonable expense, to procure a person who could explain the proceedings to a foreign defendant. The cases in which a contrary doctrine is laid down are all upon some statutory or constitutional provision."⁹²

It should be noted, however, that this jurisprudence is more than half a century old and antedates by many years the Canadian Bill of Rights. We find that older cases have allowed interpreters when requested by the parties or their counsel and when a party or witness was shown not to understand the language of the court or not to be able to speak it with sufficient fluency to expedite the conduct of proceedings.⁹³ On the other hand, proof that there has been no relaxation of judicial scepticism is to be found in the decision of the Quebec Court of Appeal which dismissed the appeal of a Pole who claimed that, although he had been a resident in Canada for several years, he had been unable to understand, in the absence of an interpreter, the nature of the charges brought against him and that this was the only reason why he had pleaded guilty.⁹⁴ The court's ruling was based on the questionable assumption that the appellant "a certainement eu l'occasion d'apprendre au moins les rudiments de l'une ou de l'autre de ces langues."

4.23. Furthermore, the courts have repeatedly decided that the right to an interpreter can be waived implicitly or explicitly.⁹⁵ The leading case in point, in England as well as in the United States and Canada, is the decision of the British Court of Appeal in *R. v. Lee Kun*:

When a defendant ignorant of or insufficiently acquainted with the English language is represented on his trial by counsel, the general rule is that the evidence must be interpreted to him, unless he personally or by his counsel dispenses with a translation. Such dispensation is in every case at the discretion of the judge, who must always be satisfied (including the case of deaf and dumb defendants fit to plead) that defendant substantially understands the evidence and the case against him.⁹⁶

As Lord Reading said:

We have come to the conclusion that the safer, and therefore wiser course, when the foreigner accused is defended by counsel, is that the evidence should be interpreted to him, except when he or counsel on his behalf expresses a wish to dispense with the translation, and the judge thinks fit to permit the omission; the judge should not permit it unless he is of opinion that by reason of what has passed before the trial, the accused substantially understands the evidence to be given and the case to be made against him at the trial. To follow this practice may be inconvenient in some cases, and may cause some further expenditure of time; but such a procedure is more in consonance with that scrupulous care of the accused's interest which has distinguished the administration of justice in our criminal courts, and therefore it is better to adopt it. No injustice will be caused by permitting the exception mentioned.⁹⁷

Two or three years before the *Lee Kun* case, the Nova Scotia Supreme Court had come to a similar conclusion:

A prisoner who is ignorant of the language in which trial proceedings are conducted has no inherent right to be furnished with a literal translation of all that takes place at the trial; when the substance of the evidence in chief of a witness called on behalf of the prisoner is explained to him, the omission to explain to him in like manner what the witness said on cross-examination is not a ground for quashing a conviction, the prisoner *having been represented by counsel* and having suffered no prejudice by the omission.⁹⁸

In this case there was a persuasive dissent by Mr. Justice Graham who argued that just as it was impossible for an accused in a criminal case to waive through counsel the right to be physically present at trial, there was no way to waive the right to be intellectually present by understanding the proceedings. We quote the following passage from this dissent:

To say that the deaf man or the foreigner who does not understand the language of the proceedings has not the inherent right to have them made intelligible to him is to say that the privilege of being present during his trial and the privilege of hearing and cross-examining witnesses against him was a mere form and that the common law was satisfied to have the letter of its requirement complied with while its spirit and substance went unfulfilled.⁹⁹

Mr. Justice Graham's dissent, with which we agree, does not seem to have found any echo in Canada. In 1946 the Court of Appeal of British Columbia in the case of *R. v. Prince* followed literally the *Lee Kun* decision. The court held: "A new trial will not be ordered on the ground that the evidence of accused, an illiterate Indian with an imperfect knowledge of the English language, was not given through an interpreter, where the translation was dispensed with at the request of counsel for accused with the permission of the trial judge, and it appears that accused substantially understood the evidence given and suffered no prejudice."¹⁰⁰

We also draw attention to a 1902 decision of the Quebec Court of Appeal in the case of *The King v. Lorne*.¹⁰¹ In this case an English-speaking accused had been convicted of murder on evidence relayed mainly by French-speaking witnesses and before a French-speaking jury. The prisoner was defended by an attorney whose mother tongue was French. The court first seemed to adopt the point of view which was to be expressed a decade later by Mr. Justice Graham, in *R. v. Sylvester*:

Every person who is charged with the commission of an indictable offence is entitled to be present in court during his trial; and he has the right to make a full answer in defence to the charge made against him. He may defend himself either personally or by counsel, and in the latter case, his counsel stands in his place to do and say anything which the defendant on his trial might do and say himself. Counsel for the defendant makes objections, cross-examines the witnesses for the prosecution, examines the witnesses called on the defendant's behalf, and addresses the court and the jury. When a defendant is not defended by counsel, he cross-examines the witnesses for the prosecution and addresses the jury respecting their evidence himself . . . but in order to do so efficiently and have the benefit of the full answer in defence to which he is entitled, it is necessary that he should understand the language in which the witnesses gave their evidence, and when he does not under-

stand the language of the witnesses, he is entitled to have the evidence translated to him.”

But, the court added, “this rule does not apply in the case of a defendant defended by counsel who thoroughly understands the language used by the witnesses.”¹⁰² Furthermore the prisoner had not asked for a mixed jury and had consented to trial by a French-speaking jury. It would thus appear that Canadian courts are quite willing to allow an accused to waive his right to an interpreter, particularly when he is represented by counsel. We deem this practice dangerous and contrary to a sound concept of justice.

3. The role of the interpreter

4.24. The role of the interpreter depends on the particular circumstances of any given case. If all the parties understand the language of the court, he might be limited to translating the evidence of witnesses who speak a foreign tongue. His intervention becomes particularly significant, however, when it is one of the parties, or the accused in a criminal case, who does not understand the language of the court. Then, his function is to translate the entire proceedings in addition to conveying to the court such party's own testimony.¹⁰³ But it should be borne in mind that the role of the interpreter is confined to translating from one language to another. He must translate only what is actually said and must not on his own initiative draw inferences from the evidence and convey such inferences (which in any case may be distorted) to the person for whom he must translate. In a case in which an interpreter induced an accused to plead guilty as a result of such an erroneous inference, a new trial was ordered because the accused could not be deemed to have wanted to plead guilty.¹⁰⁴ The court uttered words of caution to magistrates confronted with similar situations:

There ought to be the very greatest care taken to ascertain that the accused understands before a plea of guilty is accepted. Particularly is this the case when it is apparent, as it must have been here, that the interpreter was having considerable conversation with the accused and that the interpreter might be making inferences of his own instead of translating literally everything that was said. Indeed, the interpreter should be instructed to tell the Magistrate exactly what he himself has said to the accused and to interpret each answer separately and exactly as it was given so that the Magistrate would hear in English absolutely everything that was asked and said and so make his own inferences and not risk the possibility of having merely the interpreter's inferences reported to him. Indeed, in such a case, wherever there is the slightest possibility of misunderstanding it would be far safer and far more in accordance with the fairness demanded in judicial proceedings to enter a plea of not guilty and let the prosecution prove its case which, of course, it always comes prepared to do. There could have been no great amount of evidence to be taken in any case. Whatever may be the duty of a prosecuting policeman it is not the Magistrate's first duty to get a quick conviction. Rather it is his duty to see that absolute fairness is observed between the Crown and the accused and, if the accused must be convicted, that his conviction is made only after he is plainly shewn to be guilty beyond all reasonable doubt.¹⁰⁵

One of the reasons great care should be taken not to permit interpreters to go beyond their appointed role of translation is the propensity which all practising attorneys have

observed of some of them to try to provide free legal advice to an accused with whom they sympathize. In 1965 the Quebec Court of Appeal ordered a new trial in the case of a prisoner who had pleaded guilty on the advice of his interpreter.¹⁰⁶

4. *Qualifications of interpreters*

4.25. Obviously it is essential that interpreters be well qualified in the various languages in which they work and also schooled in their exact duties before the court. At the present time there is no jurisdiction in Canada which provides for the training and qualifying of interpreters. In fact, at the moment the only academic training in interpreting—as distinguished from written translation—is given by the University of Montreal. There are no training schools for court interpreters as such. While official stenographers are required to pass stiff examinations set by the bar associations or the courts, literally anyone can set himself up as a court interpreter! There is no such thing as certified court interpreters. The competence of interpreters is decided by the trial judge in each case.¹⁰⁷ It is hard to imagine any person less able than the ordinary trial judge to determine the knowledge which the proposed interpreter has of a foreign language or even of the court's own language.

While the present system may be justified in certain areas and for languages which are rarely used, it is nevertheless highly dangerous to make the property, life, or limb of an individual hinge on such haphazard selection. Furthermore, the interpreter is not even required to translate every word of what is said: it is sufficient that he fully, faithfully, and accurately convey the gist or substance of what is said, and he may omit irrelevant details.¹⁰⁸ The sole judge of what is relevant is the interpreter himself. A more questionable method of rendering justice is hard to conceive. The courts themselves show an awareness of the problem and particularly of the incompetence of some interpreters. As early as 1903, the Supreme Court of British Columbia remarked: "In dealing with Indians and Chinese in our Province who have to have all their evidence filtered through an interpreter, who is seldom acquainted with the niceties of the language into which he interprets the native tongue, one has to take what is the actual purport of the statement without criticising the terms in which it is couched."¹⁰⁹

The incredible amateurishness of the present system is well illustrated by the recent case of *Nishi v. M.N.R.*¹¹⁰ before the Tax Appeal Board. The appellant was a Japanese who knew hardly any English. The government produced a totally unsatisfactory interpreter who had to be replaced by the appellant's own daughter-in-law. Although she could hardly qualify as an unbiased officer of the court, respondent's counsel did not object. In his judgement, the Board indicated its suspicion that the translation had been inadequate but stated that it had to take the evidence as presented.¹¹¹ One may well wonder how justice can be rendered in such circumstances and why the Board did not act *proprio motu* to correct the situation. As will be seen in the next section, dissatisfaction with the qualifications of interpreters is a common phenomenon in legal circles all over Canada.

5. *The use of interpreters in court proceedings*

4.26. Because of the absence of adequate legislative regulation of the function of interpreters and the total lack of reliable information on the practices of Canadian courts in this field, we conducted, in the late summer of 1964, an informal survey among members of the judiciary and bars of all the provinces and territories and backed it up with a later survey among all the chief justices. In addition we consulted directly with some interpreters who work in Montreal and with officials of the University of Montreal. While we do not claim any scientific accuracy for the results of our research, nor that it is in any way complete, our findings are supported by sufficient evidence to be highly revealing. The replies from widely separated respondents were sufficiently consistent with one another to show general patterns. On the whole, we found the Canadian system of interpretation to be weak, improvised, and likely to lead to a miscarriage of justice. Our findings for each province and territory are summarized below.

a) *Alberta*. Our informal poll of judges and practising lawyers disclosed that the conduct of proceedings in which a foreign accused was involved varied considerably. How much of the proceedings will be translated seems to depend on counsel for the accused. He may waive, or may be deemed to waive, the right to interpretation. Nevertheless, some judges stated that *all* the evidence would be translated. This is a situation which we found in all provinces. The right to waive interpretation has already been discussed.¹¹² It was pointed out to us that interpretation from French to English was seldom required and that in most cases where it was demanded it would be from Ukrainian or other European languages. Some replies pointed to the difficulty of finding competent interpreters. One reply revealed that in some lower courts, when all the parties and their attorneys as well as the magistrate were French-speaking, French would be used in the court proceedings.¹¹³ These were cases in which no stenographic record was taken and which consequently could not be appealed. Court stenographers in Alberta as well as in all provinces but Quebec know only English and cannot take down a case conducted in French. One justice wrote to us as follows:

Singularly enough, we have very little occasion to use interpreters. I never recall the need of an interpreter in the French language in twenty-three years on the Bench. Occasionally we require an Indian interpreter in the Cree language, occasionally an Italian, and perhaps most frequently Ukrainian. However, in the homogeneous area of Southern Alberta, new Canadians are being readily assimilated, so we are really wholly free from linguistic problems.

Since dictating the above I have been informed by our Clerk that they have no list of interpreters, which means that when an interpreter is required the lawyers involved secure one, without requiring any intercession on the part of the Clerk's office.

b) *British Columbia*. Our survey of British Columbia indicated that the extent of interpretation depended on counsel for the accused, although some replies stated that all the evidence would be translated. It was stressed that French was only one of many languages which might require interpretation and that, furthermore, the need seemed to occur more in the lower jurisdiction, since persons who do not know English are generally recent arrivals whose dealings with the courts of the province are relatively minor. A

similar situation was found in practically all the provinces. A justice of the Supreme Court of British Columbia advised us as follows concerning interpreters:

These people have no official standing in the Courts, they are known to be competent translators who are available when required. Frequently a litigant's lawyer will bring his own interpreter and, if no objection is raised by opposing counsel, that interpreter is used.

It may interest your Commission to know that in the twenty-six years I have spent on the bench of this province I cannot remember one instance in which a French interpreter was required. This is simply explained. The only settlement of Canadian citizens from Quebec ever established here was Maillardville, actually a part of New Westminster. These good people were a very small island in a sea of English speaking Canadians and they all speak English. Since the time of Maillardville very few people have come to British Columbia from Quebec and there has never been any substantial immigration from France into British Columbia. Most of the interpretation I have listened to has been of Chinese, Japanese and native Indian languages. The need for it is on the decline. Many European immigrants come here equipped with English, the Orientals here can now, almost all of them, speak English as can about ninety-five per cent of our native Indians.

He enclosed with his letter a list supplied by the Registrar of the British Columbia Supreme Court of interpreters ordinarily used by the Court. It listed interpreters of 27 different languages including French. Some of them were listed as being able to interpret two or more languages.

c) *Manitoba*. The practice in Manitoba varies from translating only the charge or information to interpreting the entire case, although here too there was an indication that the evidence would not be interpreted if the accused was represented by counsel. Some respondents stressed that Ukrainian was heard more often than French and that French was only one of many foreign languages which might require interpretation. As in Alberta, New Brunswick, and Ontario, some judges pointed out that French was used *de facto* in some lower courts when all the participants and their lawyers were French-speaking. One justice replied as follows and in French:

We have at the Court house one bailiff who translates from French into English and another who translates from four or five European languages, excluding French. It is principally in Magistrate's Court that their services are required. The bailiff who translates from French into English is not competent and the Franco-Manitoban lawyers, when they need an interpreter, almost always swear in one of their law students or a competent friend. Really there are no problems.¹¹⁴

d) *New Brunswick*. From the replies received we elicited that there is a great deal of dissatisfaction with language use before the New Brunswick courts. The practice varies from translating the entire trial to interpreting parts of it or only the charge and sentence, particularly when the accused has counsel. We were advised by most of our correspondents that in some jurisdictions, where all the parties and the magistrates were French-speaking, the entire case would be conducted in that language although the record would be entered in English.¹¹⁵ Some pointed out that there were cases where counsel had been permitted to address all-Acadian juries in French, at least when such address did not have to be taken down in writing by the court stenographer. Obviously, the difficulty in permitting the conduct of a case in French when all court officials and stenographers are

English is that it precludes the parties from going to appeal, since the Court of Appeal will only look at a transcript of a trial. Justice can be conducted in two languages only if it can also be recorded in these languages and if the Court of Appeal is able to understand them. A justice of the New Brunswick Supreme Court wrote us: "I may say that we have in this province no official interpreters. When an interpreter is required some individual with no connection with the Court is called in to do so. The Judge always makes certain that such person is acceptable to all concerned."

e) *Newfoundland*. The practices of Newfoundland courts appear to be similar to those of other provinces. There seem to be very few cases requiring interpretation. When interpreters are needed they seem to be found among professors at Memorial University. Translation from or into Eskimo is made by Moravian missionaries.

f) *Northwest Territories*. A justice of the Territorial Court wrote us as follows:

This Court is pretty close to the people and has no serious problems in dealing with persons who do not speak the official language.

We have no list of interpreters who do translation work in the Territorial Court of the Northwest Territories.

We use many interpreters in our Court, particularly for the Eskimos and Indians when on Circuit. We make use of local interpreters from the area in which the Court is sitting. There are a number of Eskimo and Indian dialects and it is necessary to have local interpreters. We have little difficulty in finding local interpreters. These are appointed by the Court, sworn, and paid by the Department on a per diem basis. We frequently have two interpreters, one for the Court, and one for the accused. This interpreter assists the accused and is also a check on the other interpreter.

We also use interpreters for many New Canadians and others who have not an adequate knowledge of English. In these cases we also use local interpreters.

We also received a reply from a judge in a police magistrate's court confirming this information: "The language customarily used in Courts of the Northwest Territories is the English language. The greatest requirement for translation is interpretation of the Eskimo language and the various Indian languages and dialects into English. Due to the variety in the languages used at different points, a local person is often employed to act as interpreter and is paid as such by the Court." Annexed to this letter was a list, by settlements, of persons who acted as interpreters at court hearings of the Police Magistrate's Court and all Justices of the Peace (summary conviction) Courts in the Northwest Territories during the calendar year 1964. A total of 61 interpreters acted in 255 cases. The detailed breakdown in Table IV.1 shows that only one of these cases involved interpretation from French.

Table IV.1. Interpretation in courts of the Northwest Territories, 1964

Language	Number of interpreters	Total cases
Eskimo	19	175
Indian	41	79
Other (French)	1	1
Total	61	255

g) *Nova Scotia*. A justice of the Supreme Court of Nova Scotia stated that the practice in his province was the same as elsewhere: "... [there] is so far as I know or can find no official list of interpreters who do translation work in the Courts in Nova Scotia. Interpreters, when necessary, are selected by the presiding Judge and sworn, and there is usually agreement by counsel as to the interpreter selected. The selection of interpreters is on an ad hoc basis." We also received the following comments from a local barrister:

If a witness does not understand English he may testify in his own language with which he is familiar. In practice these are the steps taken:

1. The following oath is put to an interpreter:

"You shall well and truly interpret to ... a witness here produced, on behalf of ... in the suit ... against ... the questions and demands made by the court to the said ... and his answers made to them. So help you God."

2. Counsel examining the witness phrases the question in English.

3. The same question is repeated to the witness in his own language.

4. The witness replies in his own language.

5. The interpreter repeats the answer in English.

The question as first asked by counsel and the answers as given by the interpreter are recorded by the Court Reporter.

This practice applies to all courts ...

There is no distinction in this practice between civil and criminal cases, and an accused in a criminal trial may give his testimony through an interpreter. The interpreter's version of the testimony is in fact regarded as the official record.

The expense in civil cases is borne by the unsuccessful party unless otherwise ordered for particular reasons and in criminal cases is borne by the Crown. We know of no change in this practice if translation from French is involved.

The general practices seem to be the same as in other provinces. Much seems to depend on the counsel. One lawyer pointed out that some courts seem reluctant to allow interpretation when requested by French-speaking Acadians because they suspect them of knowing English much better than they "pretend." He stated that injustices often resulted from this judicial prejudice since a person might be able to speak some English without being able to understand the language fully or to think in it. He felt that no one should be required to testify in a language he had not fully mastered. This seems to us a sound opinion.

h) *Ontario*. The general practices of Ontario courts as to the extent of interpretation are the same as in other provinces. Several of our sources indicated that there was a widespread practice in the lower division courts in districts such as L'Orignal, Ottawa, Sudbury, North Bay, Cochrane, Kenora, and Sault Ste Marie, where there are many Francophones, to allow all proceedings to take place in that language when all concerned spoke it and the case was not appealable.¹¹⁶ Some of our respondents complained of the difficulty of obtaining competent interpreters or of the reluctance of some judges to allow interpretation when they feel that the party requesting it has some understanding of English. Some lawyers also stated that they had witnessed lower court judges try a foreign accused who did not understand the proceedings and had the assistance of neither counsel nor interpreter.

A list of persons who in the past had volunteered or been used as interpreters in the magistrates' courts in Metropolitan Toronto covered 34 languages including French. A

remark prefacing part of the list is illuminating: "It is not known whether they are all competent or even whether they are all available now or not as only a few of them are tried and proven and this group are marked with an asterisk. The more frequently used also interpret in the high courts."

i) *Prince Edward Island*. There appears to be little need for interpretation in this province. One judge wrote us, "A fairly large percentage of the accused here are French but they all speak English and the situation does not arise." Another stated: "Practically all the residents of the Province who are called as witnesses speak English, and only occasions on which interpreters may be required are those where witnesses from outside the Province are called to testify. I think the only available interpreter who has already served in that capacity is. . . ." He listed as available French interpreters a court official, a lawyer, and a college professor.

j) *Quebec*. The situation in Quebec is similar to that in the other provinces. In a very large number of cases French and English are used intermittently depending on the language of a particular witness or the inclination of the attorney. Most lawyers, particularly in the Montreal area, can switch from French to English or back without too much difficulty. The bilingualism of a large segment of the bar has simplified what could otherwise become a gigantic problem since most lawyers are willing to waive for their client the right to an interpreter when they themselves understand the language of the proceedings. But, subject to these remarks, there is no difference between Quebec and the other provinces. Quebec law does not regulate the use or qualification of interpreters, and the manner of picking interpreters is the same. Some interpreters have an established reputation and are constantly seen around the courts in Montreal, but neither the author nor several colleagues he has consulted have ever seen a trial judge conduct, or a lawyer request, an investigation into the qualifications of a person proposed as an interpreter in a particular case. Confidential conversations with a number of the more active and better known interpreters in Montreal have disclosed problems which may not be peculiar to the Canadian metropolis. For instance, the tariff of remuneration for interpreters is too low and some lawyers object to paying more than the amount fixed by the tariff. Some interpreters have begun organizing to obtain an increase in their remuneration. At the present time there is an old tariff providing for \$2.50 for a half-day of interpreting, although the Quebec Department of Justice in criminal cases will allow \$5.00 per half-day.¹¹⁷ It is felt that a special school of court interpreters should be created to train prospective interpreters not only in translation but also in court procedure. Indeed, as we have seen, interpreters are not averse to acting as gratuitous legal advisers. Frequently the accused will ask the interpreter what to answer to the question of the court as to his guilt or innocence, or the interpreter will take it upon himself to advise the accused on the strategy the interpreter deems appropriate. In other cases the interpreter misunderstands the court's decision. One example cited was the judge's order that the accused be freed upon depositing a bond of \$100.00. This was translated to the accused by telling him that he had "to pay \$100.00 to the court."

In another case the interpreter simply told the accused to "go home." Because of the inadequate remuneration in criminal cases, interpreters shy away from accepting cases which will last several days or several weeks, since they prefer short cases which enable

them to accumulate several fees for the same half-day. Our interviewees stressed the importance of familiarity with local idioms and the linguistic difficulty of conveying the colloquial usage of one language into that of another. There seems to be general agreement on the need for training, official screening and recognition, and adequate remuneration. Furthermore, some interpreters were critical of the administration of justice in dealing with the language problem. Some court clerks will ask a witness or an accused whether he speaks French or English and be satisfied with a *yes* or *no* without inquiring any further, although it has happened that a party has claimed to understand English when he knew barely fifty words of the language. In case of doubt, verification should be undertaken. Some interpreters also feel that courts tend to dismiss too lightly an accused's complaint that he does not understand the charge or evidence against him and fail to provide for an interpreter even where it is apparent to all that interpretation is necessary.

k) *Saskatchewan*. The court practices in Saskatchewan appear to be the same as everywhere else. One judge pointed out that there was a decreasing use of interpretation and that at the present time translation, when it occurred, was mostly of Indian languages. One case was pointed out to us in which a district court had refused an interpreter to a Ukrainian born in Canada on the ground that he should have learned English by this time. In another case a judge was described as having refused an interpreter because the party had no business coming to court if he did not understand English. Although there was some indication that in the lower courts French was sometimes used, many respondents said that Ukrainian and other languages were more of a problem than was French.

A justice of the Court of Queen's Bench of Saskatchewan wrote us that the courts of this province had no list of official interpreters and that the usual practice was for counsel to find and propose to the court some person proficient in both the language in question and the official language, and impartial between the parties.

l) *Yukon Territory*. We were advised as follows concerning the Territorial Court of the Yukon Territory in Whitehorse: "We do not have, in this Court, any regularly employed interpreters nor do we maintain a list of those persons who are occasionally called upon for this service. Need for interpreters is most infrequent. Our population is predominantly English-speaking and any need for interpreters arises only in respect of a few native Indians and, occasionally, with respect to newly-arrived Central European immigrants."

6. *Interpreters in trials by mixed jury*

4.27. We have noted the absence of any provision governing the conduct of a trial before a criminal mixed jury in Manitoba. If the accused elects to be tried by jury composed of six French-speaking and six English-speaking citizens, must the proceedings also be conducted in both languages? What is the practice of Canadian courts? The lack of reported jurisprudence on the last question would require a detailed survey which we did not have time to carry out. Jurisprudence on juries *de medietate linguae* in other jurisdictions would not be of much assistance because, as we shall see, the right to a jury *de medietate linguae* was limited to being the right to a jury of which half the members were

foreigners, but not necessarily of the accused's own country or language.¹¹⁸ Nor were proceedings before such a jury conducted in a foreign language. In Quebec, we have found only two decisions dealing with the use of language and the role of interpreters in trials by mixed jury, both of them from the Supreme Court. The first one was in the case of *Veullette v. R.*¹¹⁹ The appellant, after being accused of murder, said through counsel that he was French and elected to be tried by mixed jury. The six French-speaking jurors stated to the court that they understood and spoke both languages. Thereafter, the trial was conducted in English. One ground of appeal was that the trial judge had not summed up the case to the jury in French. On the ground that this had not produced a "substantial wrong or miscarriage of justice" the appeal was dismissed by the Supreme Court, with one dissent. In their opinions, various justices of the Supreme Court considered the language rights of an accused who is tried before a mixed jury. In the Court of Appeal, Chief Justice Cross, dissenting from the majority, had held that proceedings in such a case should be conducted in both languages to protect the rights of the accused. Mr. Justice Idington in the Supreme Court felt, on the contrary, that such insistence on conducting the case in two languages might jeopardize the rights of the accused:

There is no other class of criminal trials which produces such a strain upon the minds of those concerned as does a trial for murder. There would inevitably result, from a repetition in two languages of all that was expressed, a prolongation of the trial tending to fatigue and inattention on the part of the jurors and possibly a confusion of thought which tiresome reiteration is apt to produce.

The just rights of an innocent man might be needlessly jeopardized in such a case.

The statutory right given an accused and now in question had originally a deeper import than the mere right to the use of the two languages. The latter right in substance is recognized in the due and proper administration of justice wherever and whenever, and so far as necessary; though not carried to the extent that the law in question does relative to the selection of a jury.

.....

The case was not one that, so far as we are informed, needed anything but the ordinary conversational skill in use of language to apprehend what was said.

Cases are conceivable in which terms might be used calling for more than that degree of skill. Then, of course, care must be taken that each set of jurors fully understands the import of what is said.

In cases of trial for murder, where there is a possible alternative, of the crime being reduced to one of manslaughter, it frequently happens that nice distinctions of law need to be observed and in explaining such distinctions it might be well for a judge charging a jury to make such distinctions clearly understood by using both languages, lest a juror might not understand same when addressed in another than his mother tongue, even if he had acquired the facility of carrying on an ordinary conversation in another language. But in a murder trial such as this happened to be where it was inevitably either murder or nothing, all the jurors had to understand was the statement of plain ordinary every-day facts.¹²⁰

In the view of Mr. Justice Idington it was sufficient for the members of the mixed jury to have a "conversational skill" in the language used and, in fact, repeating in two languages might even produce risks for the accused.

Mr. Justice Anglin felt that an accused electing to be tried by a mixed jury was entitled to have the case conducted in both languages, for otherwise the right to a mixed jury "would be purely sentimental and no right real and substantial in character would be conferred by it."¹²¹ However, the learned judge felt that there was considerable evidence in the record to indicate a tacit consent by the accused to the fact that the trial was conducted entirely in English. He pointed out that the accused himself had testified entirely in English.¹²²

Mr. Justice Brodeur dissented on the following grounds:

Now, what is the extent of the right granted the accused?

It has been claimed that this right consisted of the choice of jurors only and did not include the duty of the court to see to it that all proceedings be conducted in both languages so that they might be properly understood by all members of the jury.

In my view this would be a very deceptive right if, notwithstanding the right which an English-speaking person, for example, would have to choose a mixed jury, the crown were permitted to produce French-speaking witnesses without translating their evidence into English so that their testimony would be understood by the English-speaking jurors. This would constitute a grave denial of justice.

It would be the same for the judge's charge. He should see to it that his charge is understood by the whole jury.

It is true the law is silent on the way in which a case must be conducted before a mixed jury. But I could not wish for a better interpretation of the law than the practice followed continuously for more than one hundred and fifty years of having the testimony of witnesses translated into one language or the other in the case of a mixed jury, and the judge's charge also made in English and French or translated into one language or the other. . . .

Nor did he believe that an implicit waiver was sufficient:

But people say: there was no protest in the present case when the judge omitted to speak French, when the prisoner testified in English, and when his lawyer spoke only English in addressing the jury. Moreover French jurors were asked if they knew English and they answered yes.

All these circumstances could not prove that there was a formal consent to this illegality. I wonder, as a matter of fact, if in a murder trial a formal consent would be sufficient. Criminal law requires that in trials which could lead to capital punishment, every precaution should be taken to follow all rules of procedure with the greatest possible care. (Russell on Crimes, III, 2156.)

In our files we have proof that a certain juror did not have a sufficient knowledge of English to understand everything that was said by the judge and witnesses.

We have also in our files information which, although it does not affect the question under discussion, is a good illustration of the importance of having all testimony properly translated. One of the witnesses testified in English and related a conversation of the accused which actually took place in French. He was asked to repeat the text of this conversation in French. There was an important variation. This was brought to the witness's attention and he felt constrained to say [in English]: "The way they rattle me up is in French and English. I have a little of both and all the words are mixed up."

This testimony was one of the most important in the case. It is clear that the English version of the conversation as given by the witness incriminated the accused far more than the words which the latter apparently used, according to this same witness, when he cited the French text. This French text does not seem to have

been translated into English for the jury and information in our files shows that certain jurors did not understand French at all.

All of this demonstrates the importance of conducting the case in both languages and the danger of not doing so.

In order to uphold the verdict, the defendant also relied on the fact that the defence lawyer did not address the jury in French.

The accused was evidently a very poor adolescent without family or protection. He found in his young defender a very devoted man who evidently undertook the present case without hope of receiving one cent. But the lawyer himself stated in his factum [in English] that "he was a very young member of the bar and had not then the advantage of the experience which he has since acquired [and] was led into the error of following the action of Crown counsel and of the presiding judge."¹²³

We saw in the preceding section that the practice of Canadian courts is to permit counsel on behalf of his client to waive implicitly or explicitly the right to interpretation. While this might result from an understandable concern to speed up proceedings, it appears to us to deprive the accused of the right to understand fully the evidence against him and to make a complete defence. How can a party who is ignorant of what goes on instruct counsel properly?

The famous Quebec jurist Mr. Justice Mignault agreed with his dissenting brother but did not deem the injustice to constitute a "substantial wrong or miscarriage" requiring a new trial:

Returning now to the provision of Statute 27-28 Vic. c. 41, it is clear that this provision would be deceptive if, in a trial conducted before a mixed jury, the testimony were not translated from French into English and, conversely, if the address of the judge presiding at the trial were not delivered—at least in its essential parts—in the two languages. This has always been the practice in the province of Quebec, and the learned counsel of the defendant before us, Mre Gaboury, in answer to a question I put to him, admitted that this practice was also followed in the district of Pontiac. I am thus of the opinion that the prisoner who demands a mixed jury has the right to have a trial conducted in both languages, French and English—a right which also includes [the language of] the address of the judge to the jury.

The fact has been put forward that in this case the French-speaking jurors had declared at their swearing-in that they understood English; that when the first witness testified in English, the French-speaking jurors, questioned by the judge, replied that they had understood his evidence; that the prisoner's defence attorney had spoken in English in his plea to the jury; and that the prisoner himself had testified in English. From this evidence the conclusion was drawn that the prisoner had consented to have his trial conducted in English.

I should hesitate to conclude from the silence of the prisoner, or even from the fact that he testified in English, that he had waived his undoubted right, resulting from his choice of a mixed jury, of having his trial conducted in the two languages. But can I say that in this case there is what the question submitted calls "substantial wrong or miscarriage," without which, according to the terms of section 1019 of the Criminal Code, a new trial cannot be ordered? . . .

I am strongly of the opinion that something has been done during the trial which does not conform to the law—namely, that the accused had the right to have his trial conducted in both languages and to have the judge's address to the jury delivered or translated, at least in its essential parts, into one language or the

other. But since the Criminal Code requires further that it be my considered opinion that a real wrong or denial of justice has resulted, I cannot, considering all the circumstances of this case, go that far.

I must thus, not without regret, concur with the decision of the Court of Appeal on this first question.¹²⁴

The point came up again, but indirectly, before the Supreme Court in *Reference re Regina v. Coffin*.¹²⁵ One ground of appeal was that Coffin had been tried before a mixed jury, the evidence being translated from one language into the other; the charge having been in both languages, and counsel for the prosecution and defence having addressed the jury in both languages, there had been some difference between the two versions of each address and each charge. This ground was dismissed by the Supreme Court. Expressing the court's opinion, Mr. Justice Kellock stated:

It is contended that because of differences between the addresses in one language and the other and between the charges delivered by the learned judge, the result is that the appellant was really tried by two groups of jurymen composed of six men each. It is also contended that s. 944 of the *Criminal Code* requires that the jury be addressed by one counsel only on each side.

When it is remembered (as we were told by Crown counsel without contradiction) that the practice followed with respect to translation, the charge and the addresses has been the invariable practice in the Province of Quebec since 1892 at least, when the *Code* was first enacted, and that during all of that time s. 944 has been in its present form, the contention, in so far as it is based on that section, cannot, in my opinion, succeed.

.....

In my opinion, neither the differences to which we were referred as between the address on behalf of the prosecution in the one language and the other, nor the charges, were of a nature to call for the interference of this Court in the grant of a new trial.¹²⁶

If we summarize the law on the basis of the Supreme Court's decisions, it would appear that in a trial by mixed jury the accused is entitled to demand that all the evidence be presented in both languages, counsel can address the jury in both languages, and the judge can charge the jury in both languages. Minor differences between the French and the English versions of these addresses and charges will not invalidate the trial. Furthermore, the accused might waive explicitly or tacitly his right to having the trial so conducted in two languages. We have already indicated that, although this is the weight of the jurisprudence, we prefer the dissenting opinion of Mr. Justice Brodeur in *Veillette v. R.* that such right cannot really be waived. In addition, if this is the law in Quebec, we do not see how it can be different in Manitoba for criminal trials before a mixed jury. We reiterate our inability to find any relevant Manitoba decision on this point. It is thus evident that trials before a mixed jury can create important problems of interpretation which render essential the availability of competent interpreters.

7. Interpreted evidence

4.28. Another problem arises from the fact that some courts appear to attribute less weight to translated evidence than to testimony in the court's own language. For in-

stance, in *R. v. Ciarlo* the Quebec Court of Queen's Bench Crown Side considered a case in which a witness, who spoke only French, had given evidence in that language at preliminary inquiry where it was translated into English and taken down by the translator. He testified again at trial. Defence counsel then moved to read the previous deposition of that witness to show contradictions between the two. Trial judge Wurtele denied the motion on the ground that the earlier translated evidence could not be used to contradict the witness:

In order to show a contradiction between the evidence given by a witness at a preliminary inquiry and that being given by him at the trial, his deposition may be read, but such deposition should contain the witness' own words and expressions. In the present case, the evidence was given in French, but it was translated and taken down by the translator in English. The words taken down are the translator's, and what was so taken down was not explained to the witness. The meaning of the words uttered by the witness may have been entirely altered in the translation, and the witness must be contradicted by what he may have previously said himself, and not by what a translator, without verification, has made him say. The deposition, therefore, should not be used for that purpose.

I consequently rule that the deposition cannot be read.

But the witness may be cross-examined as to any statement made by him relative to the subject-matter of the case at the preliminary inquiry and inconsistent with the evidence he has now given, and should he not admit such statement, it may then be proved by witnesses who were present and heard it.¹²⁷

In *R. v. Walebek*, a case half a century old, the Saskatchewan Supreme Court held admissible in evidence a statement made by a foreign witness at a preliminary inquiry, condensed into English, then read back to him in his own language by the interpreter and signed by him. The accused objected that the Crown could not produce the statement without proving that the interpreter had correctly translated both the statutory warning concerning such statement and the statement itself. The objection was overruled by the trial judge, who was upheld by the Saskatchewan Supreme Court. The court added that "if the accused did not understand what he signed, or the warning given, it was, of course, open to him to establish that fact, and the significance of the statement would correspondingly be weakened."¹²⁸

An analogous decision was rendered not long ago by British Columbia's Court of Appeal in *R. v. Binette*¹²⁹ which held that a psychiatric examination of an accused charged with being a dangerous sexual offender was not invalidated because it was conducted with the assistance of an interpreter. It was held that the Crown was not bound to prove that the interpreter had correctly translated during the accused's interview with the psychiatrist, particularly since there was no evidence at trial to the contrary. The gist of both these cases is that the burden of proving incorrect interpretation is on the party invoking it. It is apparent that this is a burden almost impossible to discharge. This is an additional argument for the formal training and qualifying of court interpreters.

On the other hand, there is no need for the interpreter to be present from the very beginning of the examination of a witness who does not speak the court's language. In *R. v. Defilippi*¹³⁰ the principal Crown witness was duly sworn in English, but during his examination he experienced difficulty in expressing himself and an interpreter was sworn to allow the witness to continue in Ukrainian, his mother tongue. On appeal, it was

objected by the accused that, because of this, the witness did not understand the nature of the oath which had been administered to him and that this was "a matter of such grave doubt that the conviction should not be allowed to stand." The Alberta Supreme Court, Appellate Division, ruled that

... if in this case the magistrate's conduct in calling the interpreter, either in itself or coupled with the evidence given up to that point, necessarily led to the conclusion that the witness did not understand the nature of an oath, then this Court should interfere, but it is a matter of common knowledge and a matter of daily occurrence that in all Courts of law interpreters are brought into a trial to interpret for a witness at all stages of his evidence with a view to expediting the conduct of the trial without the slightest suggestion that the witness cannot understand what is being said to him and solely because he may through an interpreter give his evidence with greater ease and expedition than he would otherwise do.¹³¹

An interesting sidelight on the problems which can arise from the use of interpreters is to be found in the decision of the Quebec Court of Appeal in *Gagnon v. R.*¹³² which held that where it is necessary to have an interpreter to translate the testimony of witnesses before the grand jury, the presence of such interpreter in the grand jury room during the deliberations will not invalidate an indictment.

E. Court Stenographers

4.29. Generally speaking all court proceedings which are appealable must be recorded verbatim and in full. Normally courts of appeal do not hear any new evidence and decide only on the record of the lower court. This means that all the evidence and the judgement must be taken down as well as, within certain limits, the objections and remarks, and sometimes arguments, of counsel. Otherwise an appeal is impossible. Generally speaking, the more important types of civil and criminal cases are appealable and are fully recorded. In less significant trials, the record may contain only the charge, the names of witnesses, and the decision rendered. Naturally, even in appealable cases, the parties may normally waive their right to appeal and consequently to stenography. The only exception would be cases of murder in which appeals are automatic and compulsory under the Criminal Code.¹³³ The usual practice is to record court cases by means of stenography or stenotyping. If the record is needed for appeal or for other purposes it is then transcribed by the official stenographer. In some jurisdictions, such as the Montreal Superior Court at the present time, the lack of experienced court stenographers has led to experiments with mechanical methods of recording under supervision of a deputy prothonotary.¹³⁴ It is too early to evaluate their results. However, the constant growth of judicial and quasi-judicial proceedings and the difficulties of attracting competent court stenographers make the mechanization of court recording inevitable.

4.30. We have had occasion to note¹³⁵ that in provinces such as Alberta, Saskatchewan, Ontario, and New Brunswick, French is sometimes used in cases which need not be fully recorded. In these provinces the lack of French-speaking stenographers would make it impossible to record an appealable case conducted in French and would thereby deprive the parties of their right to appeal. Admittedly, if interpreters are used, every-

thing can be recorded in the court's own language, either as spoken in the presence of the court or as interpreted before it, but this is certainly not a satisfactory method in a jurisdiction where two languages can be used. While it would be impractical to authorize the use of French before tribunals which do not have the means of recording proceedings in French, such means could be supplied either through the appointment of qualified French or bilingual stenographers, or through mechanical devices whose recordings could be transcribed by a competent typist. If the experience of the Montreal judicial district, which is the most actively bilingual one in the country, is significant, it is clear that the problem will not be solved by human recorders and that any extension or intensification of bilingual justice will require the widespread use of mechanical recorders, perhaps together with simultaneous translation. Another practical objection to human personnel is the necessity of immobilizing at least two stenographers for each court case, a French one and an English one. Even in Montreal, bilingual stenographers are a rarity. According to our information at the beginning of December 1965 there were 33 official stenographers employed for the Superior Court for the district of Montreal. Twenty-two of them took down evidence in French only; 11 in English. Only one or two of these 33 stenographers could take down evidence in both languages. The Court of Sessions of the Peace in Montreal at the same time employed 30 stenographers: 18 French and 12 English and none bilingual.¹³⁶ The practical difficulties and the delays resulting from this dearth of stenographers were underlined by Associate Chief Justice George S. Challies at the opening of the 1965 autumn term of the Superior Court in Montreal:

Associate Chief Justice George S. Challies complained today that the problem of courthouse stenographers had become intolerable.

At the official opening of the autumn term of the Superior Court he said that in the judicial year, 1964-1965, several hundred cases were unable to proceed on the contested list, because of the absence of a French, or more often, an English stenographer.

This also applied in the Practice Division of the Court, when cases had been blocked for the same reason. Many of these were cases involving alimentary pensions, or the custody of children.

"This is a situation which cannot and must not continue, and I urge the authorities to adopt the report of the General Council of the Bar, which recommends that stenographers within the district of Montreal be made full-time employees of the province on a fair and reasonable salary, and subject to the supervision of a special officer, duly appointed."

Chief Justice Challies said that, with the co-operation of members of the Bar, he proposed to experiment with mechanical methods of recording the evidence in an endeavour to find means of easing the stenographic problem.¹³⁷

4.31. If the Montreal judicial district can be used as an illustration, it is extremely difficult to find a competent court stenographer in any language. Under the Quebec Stenographers' Act¹³⁸ court stenographers "shall be officers of the Superior Court" and shall be examined by the Bar in each district. The Bar of Montreal holds regular examinations in which candidates are required to pass the following tests: a) two-minute speed test—continuous text—at 120 words per minute; b) two-minute speed test—questions and answers—at 150 words per minute; c) two-minute speed test—questions and answers—at 175 words per minute; d) transcription at a speed of 10 words per minute.

Very few candidates pass these tests successfully. In fact, if the Bar were as strict as some lawyers want it to be, hardly any candidate would ever be admitted. It has also been found that foreign candidates seem to pass the examinations with greater ease than Canadians. On the other hand, as pointed out by Mr. Lucien Lavallée, head of the stenographic services of the Montreal criminal courts, court stenographers must not only know the theoretical language, but also the colloquial language spoken in the *milieu* in which they work, including slang and frequently used foreign words. As in the case of court interpreters, there are no officially recognized training schools for court stenographers.

4.32. Since even in Montreal it appears impossible to obtain anywhere near the number of court stenographers required, the only hope for a widening of the bilingual requirements in Canadian justice, if such policy is to be pursued, lies in the widespread use of mechanical devices. Otherwise the situation will only worsen. At the present time the only statute specifically providing for mechanical recording in Quebec is the Mining Act.¹³⁹ The new Code of Procedure does not specifically permit the use of mechanical devices, but section 324 states that "depositions are taken by stenography or in such other manner as may be authorized by the Lieutenant-Governor in council." Obviously the latter words of this section are designed to permit the provincial cabinet to authorize by Order-in-Council methods of recording other than stenography or stenotypy, which are the only ones admitted at the present time.¹⁴⁰ The Quebec Bar is actively considering the introduction of mechanical devices and is conducting experiments with various recorders. These experiments have been greeted with a number of public statements by official court stenographers pointing out the shortcomings and inaccuracies of the machines used. There is little doubt in our mind that whatever weaknesses mechanical devices may display, they can all be corrected, if need be by a human assistant.

F. Enforcement of Judgements

4.33. The various provinces and territories in Canada have legislation providing for the reciprocal enforcement of their maintenance orders and judgements. In Alberta,¹⁴¹ British Columbia,¹⁴² Newfoundland,¹⁴³ Manitoba,¹⁴⁴ and the Yukon¹⁴⁵ it is provided that any judgement or maintenance order which is not in English must be accompanied by a certified English translation. The only exception is the Northwest Territories, where the Maintenance Orders (Facilities for Enforcement) Ordinance¹⁴⁶ permits the registration of a maintenance order from another jurisdiction in either English or French notwithstanding the fact that the same privilege is not extended by the Reciprocal Enforcement of Judgments Ordinance with respect to other judgements.¹⁴⁷ In view of the fact that we have come to the conclusion that French is still an official language in both the Northwest Territories and the Yukon,¹⁴⁸ we are of the opinion that the requirement for a certified English translation of French judgements and orders in these two Territories is illegal.

In Ontario the Reciprocal Enforcement of Maintenance Orders Act¹⁴⁹ provides that judgements translated shall be deemed in the English language, but the Reciprocal Enforcement of Judgments Act¹⁵⁰ contains nothing concerning the language.

The Quebec Reciprocal Enforcement of Maintenance Orders Act contains no provision dealing with language for the obvious reason that it applies only to alimony judgements rendered in other provinces.¹⁵¹ These are bound to be in English, one of Quebec's official languages. At the present time, reciprocity in Quebec exists only with Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Newfoundland, and British Columbia.¹⁵²

G. Conclusions

1. Recommended improvements

4.34. It is obvious that rendering justice in two languages is much more difficult than using one language only, but since the constitution requires or allows both languages in all the courts created by Parliament and in all Quebec courts, we should be concerned with providing the best judicial service possible in two languages. This cannot be done, in our opinion, unless considerable improvements are made in the training and screening of interpreters. It seems difficult to accept the fact that interpreters, on whose competence and fidelity the property or freedom of an individual may depend, are not given any special training and are not required to establish their qualifications by means of an official examination. If court stenographers are tested, why are not interpreters? A very close check on interpreters is indispensable particularly in view of the fact that interpreters intervene most frequently in cases where the accused is unfamiliar with Canadian justice and is not represented by counsel. As we have seen, an unskilled and well-meaning interpreter will often act as a benevolent lawyer to the person for whom he interprets, sometimes with disastrous results. We recommend that schools of interpretation be organized to train persons, not only in interpretation but also in the rights and duties of court interpreters and in court proceedings. We further recommend that whenever possible no one who has not received such training and been examined and certified by either the Bar or the Bench be permitted to interpret before courts in Canada. We further suggest that close surveillance be exercised over the activities of interpreters to prevent them from counselling the accused. We also believe that present practice of allowing interpreters in some cases to summarize evidence rather than interpreting it literally should be abandoned, as it can only lead to confusion and inaccuracies.

4.35. For reasons already outlined we recommend that the present method of human recording of court proceedings be replaced by the use of mechanical devices under the supervision of a qualified court recorder who will be an officer of the court. Furthermore, the present cumbersome system of *vive voce* interpretation in open court should be replaced by a system of simultaneous translation which will convey every single element of the proceedings to anyone who is interested. As we shall see,¹⁵³ a system of simultaneous translation was used with success by the Board of Broadcast Governors, a quasi-judicial federal entity whose functions were analogous in many ways to those of an ordinary court of law.

2. Court costs

4.36. The use of mechanical devices should contribute to reducing the costs of justice. At the present time, whether a transcription is needed or not the losing party in a civil case is required to pay fairly high stenographic fees. Even if the case does not go on, court stenographers are paid for just sitting idly in the corridor. But in criminal cases the costs are normally paid by the Crown. Mechanical recording would cut costs drastically, especially in the majority of cases where no transcript is needed.

On the other hand, an improved system of interpretation cannot be inaugurated without increased costs. In order to attract more qualified personnel to the profession of interpretation, better pay must be provided. Better hourly remuneration and increased use of interpreters, even in a simultaneous translation system, might prove to be relatively expensive and even prohibitive for some parties. This would not be too great an impediment to justice in criminal cases, where the Crown traditionally picks up the bill, but might be so in civil cases. We would not go so far as to suggest that the Crown be required to pay the costs of interpretation in all civil cases as well, but we would recommend that in those jurisdictions which are officially bilingual, and where interpretation is needed to provide bilingual justice, the interpreters be paid by the state unless the judge otherwise orders for valid reasons.

3. The problem of appeal

4.37. The conduct of bilingual justice also raises problems in appeal. If parties are going to be allowed to proceed before the courts in two official languages, the record must also be in those languages. Hence the members of the Court of Appeal who may eventually have to pore over the record must also be familiar with these languages. In Quebec there has been no difficulty to date since all judges of the Court of Appeal have always been fluent in both French and English. However there is a certain lack of ease among Quebec lawyers about the bilingualism of some members of the Supreme Court bench. If the right to have a case tried in either one of Canada's official languages were to be extended to other provinces or to specific areas of certain provinces—thereby consecrating perhaps what we have seen to be the *de facto* practice in some areas of Alberta, Manitoba, New Brunswick, and Ontario—then provision will have to be made for bilingual appeals. Either the courts of appeal of these provinces will have to have French-speaking members—a solution which might not be practical except perhaps in New Brunswick—or some method will have to be devised whereby translation of the relevant parts of the record will be provided. This method is obviously highly undesirable since a translated record is no better than the transcript of interpreted evidence, but it might be a first step. In any case, we want to stress that we should not consider extending the right to be tried in two languages unless we are prepared to enable the parties to have the same possibilities of appeal as have parties to an entirely English case.

4. Extending bilingual justice

4.38. If the right to be tried in either one of Canada's official languages is to be extended to provinces other than Quebec, not only will Canada have to overcome the

great practical difficulties outlined in this chapter and the inevitably resulting political turmoil, but a more or less flexible formula will have to be developed to determine the proportion of the total population which a linguistic minority must represent before it can demand that the system of justice applicable to it become bilingual. In our mind, the only acceptable formula is one based on census figures of the mother tongue of the inhabitants of a given area. Changes in the manner of reporting the results of the census may be required so that the figures produced may correspond with the geographical outline of the various existing levels of judicial or administrative jurisdictions. Indeed, the jurisdiction of a given tribunal may be merely local (generally corresponding to municipal boundaries) or may extend over an entire district or region, and even be province-wide (as are appellate tribunals).

Assuming, however, the availability of precise figures for any judicial district, it would be possible—once the percentage of population required has been agreed upon—to determine without difficulty, on the strength of the census figures obtained every 10 years, whether or not facilities for bilingual justice ought to be introduced in the jurisdiction. To illustrate our point, we have projected, on the basis of the 1961 census figures, what changes would have to be brought in the Canadian judicial system if such criteria were to be adopted. We have used two alternative formulas, one based on a minimum requirement of 20 per cent of inhabitants stating that the minority language is their mother tongue, and the other one being 30 per cent (a figure which would more closely reflect the 28.1 per cent of Canadians who declared that French was their mother tongue in the 1961 census). In other words, we tried to determine which jurisdictions would become officially bilingual in the event that a minimum minority of either 20 per cent or 30 per cent were required. In making the following projections, we have taken into consideration only the French and English languages, although we are well aware that in some areas of western Canada there may be sizable linguistic minorities. We are also aware of the fact that the census divisions do not necessarily correspond to the common judicial divisions. Nevertheless, we believe that the following tables may be instructive and reflect the eventual geography of a national system of bilingual justice.

a) Provinces not affected. Under either the 20 per cent or the 30 per cent formula, the following would not be required to provide bilingual justice: Newfoundland, Prince Edward Island, Saskatchewan, Alberta, British Columbia, the Yukon, and the Northwest Territories.¹⁵⁴

b) Manitoba. In this province, only census division number 1 would appear to qualify under either formula. This division has a total population of 28,734, of which 8,922 (or 31 per cent) claimed French as their mother tongue. If, instead of taking census divisions as our point of reference, we refer to cities having more than 10,000 inhabitants, the situation would be the same since the only such city in Manitoba which might qualify is St. Boniface where 13,370 (or 35.5 per cent) of the total population of 37,600 speak French as their mother tongue. Admittedly, in less populous and purely local or municipal jurisdictions, the situation might be more favourable to French, but the published census figures do not yet provide such local results.

c) New Brunswick. In this province, six counties out of a total of 13 meet the 30 per cent requirement. If the 20 per cent requirement were imposed, a seventh county should

be added, that of Northumberland whose total population is 50,035 of which 13,346 (or 26.6 per cent) have French as their mother tongue. If municipalities of over 10,000 were taken, instead of census divisions or counties, only four New Brunswick municipalities would fall within either formula (see Table IV .2).

Table IV. 2. New Brunswick counties and municipalities (over 10,000) with a French-speaking population of at least 20 per cent

	Total population	Francophones	Francophones as percentage of total population
Counties			
Gloucester	66,343	56,555	85.2
Kent	26,667	21,836	81.8
Madawaska	38,983	36,732	94.3
Northumberland	50,035	13,346	26.6
Restigouche	40,973	24,975	60.9
Victoria	19,712	7,393	37.5
Westmorland	93,679	37,940	40.5
Municipalities			
Bathurst parish	10,420	6,541	62.8
Edmundston	12,791	11,354	88.8
City of Moncton	43,840	14,105	32.2
Parish of Moncton	10,740	3,791	35.3

This illustrates vividly the potential temptation of gerrymandering bilingual jurisdictions out of existence by rearranging the boundaries of judicial districts so as to reduce the proportion of the linguistic minorities within them. This problem will be discussed at the end of the present section.

d) *Nova Scotia*. Only two out of the 17 counties of Nova Scotia would fall within the formula, even if it were based on 20 per cent. If municipalities of over 10,000 inhabitants were taken as a criterion, only two municipalities would qualify (see Table IV .3).

Table IV. 3. Nova Scotia counties and municipalities (over 10,000) with a French-speaking population of at least 20 per cent

	Total population	Francophones	Francophones as percentage of total population
Counties			
Digby	20,216	7,631	37.7
Yarmouth	23,386	7,671	32.8
Municipalities			
Inverness	15,072	4,277	28.4
Richmond	11,250	5,411	48.1

e) Ontario. Out of 54 counties in Ontario, seven would qualify under the 30 per cent rule. If the requirement were lowered to 20 per cent Carleton and Timiskaming would be added. If municipalities of more than 10,000 persons were taken as a criterion, then eight Ontario communities would have to have bilingual justice (see Table IV.4).

Table IV. 4. Ontario counties and municipalities (over 10,000) with a French-speaking population of at least 20 per cent

	Total population	Francophones	Francophones as percentage of total population
Counties			
Carleton	352,932	80,941	22.9
Cochrane	95,666	44,147	46.1
Glengarry	19,217	9,133	47.5
Nipissing	70,568	25,408	36.0
Prescott	27,226	22,491	82.6
Russell	20,892	16,166	77.4
Stormont	57,867	21,206	36.6
Sudbury	165,862	54,940	33.1
Timiskaming	50,971	13,617	26.7
Municipalities			
Cornwall	43,639	18,496	42.4
Eastview (now Vanier)	24,555	14,976	60.9
Elliot Lake	13,179	3,667	27.8
Gloucester township	18,301	7,249	39.6
Ottawa	268,206	56,882	21.2
Sudbury	80,120	23,337	29.1
Timmins	29,270	11,961	40.8
Widdifield	12,063	2,472	20.5

f) Quebec. At the present time, as we have seen,¹⁵⁵ all Quebec courts are bilingual. If the constitution were to be modified to require bilingual justice in other provinces, it is doubtful that these provinces would countenance a reduction of the protection given in Quebec to the English-speaking minority. However, as an illustration of the fact that the adoption of either formula, even the 20 per cent requirement, would wipe out most bilingual jurisdictions in Quebec, we have computed the results of their application to Quebec. It will be evident from our figures that, except for the Montreal metropolitan area, the right to justice in English benefits only an extremely small minority. If the 30 per cent formula were to be used, only the following five out of a total of 75 census divisions or counties would require bilingual justice: Argenteuil, Brome, Gatineau, Huntingdon, and Pontiac. If the requirement were lowered to 20 per cent, it would add seven counties or census division (see Table IV .5).

Table IV. 5. Quebec counties or census divisions with an English-speaking population of at least 20 per cent

County	Total population	Anglophones	Anglophones as percentage of total population
Argenteuil	31,830	9,690	30.4
Brome	13,691	7,175	52.4
Chambly	146,745	35,164	23.9
Chateauguay	34,042	10,161	29.8
Compton	24,410	4,912	20.1
Gatineau	44,308	13,428	30.3
Huntingdon	14,752	5,901	40.0
Missisquoi	29,526	6,328	21.4
Montreal Island	1,747,696	419,320	24.0
Pontiac	19,947	10,979	55.0
Stanstead	36,095	8,318	23.0
Vaudreuil	28,681	6,784	23.6

Thus, no more than 12 counties or census divisions, out of a total of 75, would be included. Bilingual justice in most of Quebec is obviously a privilege awarded to a very small segment of the population, for the overwhelming majority of counties and census divisions, having less than 20 per cent of their population claiming to speak English as their mother tongue, could not claim the right to bilingual justice under either formula. It should be noted that according to the 1961 census, out of 5,259,211 people in Quebec, only 697,402 (or 13.2 per cent) claimed English as their mother tongue. Even if the 20 per cent formula were adopted, the number of people remaining in the other counties and claiming English as their mother tongue would be 159,242 out of a total of 3,087,488.

If the same formula is applied to Quebec municipalities having a population of more than 10,000, it will be noted at once that all but one (Noranda) are situated on the Island of Montreal or in its immediate vicinity (*see* Table IV. 6).

The fact is that the English-language population in Quebec is essentially urban. Indeed, out of a total of 697,402 persons giving English as their mother tongue in the 1961 census, 604,504 lived in an urban environment, and only 92,898 were described as rural. We draw attention to the fact that the city of Montreal proper would not qualify since its 203,562 English-speaking inhabitants represent only 17 per cent of the total population of 1,191,062.

Table IV. 6. Quebec municipalities (over 10,000) with an English-speaking population of at least 20 per cent

Municipality	Total population	Anglophones	Anglophones as percentage of total population
Beaconsfield	10,064	8,327	82.7
Chomedey	30,445	7,956	26.1
Côte St. Luc	13,266	9,458	71.3
Dorval	18,592	12,309	66.4
Lachine	38,630	14,809	38.3
Laflèche	10,984	2,455	22.3
Lasalle	30,904	11,513	37.2
Mount Royal	21,182	14,045	66.3
Noranda	11,477	3,261	28.4
Outremont	30,753	6,877	22.4
Pierrefonds	12,171	6,524	53.6
Pointe-Claire	22,709	18,412	81.1
St. Hubert	14,380	5,933	41.3
St. Lambert	14,531	7,970	54.8
St. Laurent	49,805	24,293	48.8
Verdun	78,317	30,818	39.3
Westmount	25,012	17,391	69.5

It is obvious that the introduction of bilingual justice on a wide and systematic scale in Canada will create great disturbances. Furthermore, while the overwhelming majority of the English-speaking minority in Quebec is concentrated in the Montreal metropolitan area, the French minority in New Brunswick is not concentrated in one area. There, out of a population of 597,936, French was given as the mother tongue of 210,530. Of these, 136,845 were described as rural. Of the remaining 73,685, only 23,754 lived in towns of more than 30,000 inhabitants. In fact, 20,639 lived in towns of between 1,000 to 2,499 inhabitants, 3,488 in towns of between 2,500 and 4,999 population, and 6,602 in cities of between 5,000 and 9,999. In Nova Scotia, 39,568 people out of a total of 737,007 gave French as their mother tongue. Of these 28,608 (or 72.3 per cent) were described as rural. It is only in Ontario that there was more equilibrium. There, out of 425,302 people who gave French as their mother tongue, only 128,157 (or 30.1 per cent) were described as rural. Of the remaining 297,145, almost half—129,589—lived in cities of more than 100,000 inhabitants, 88,746 in cities of between 30,000 and 99,999, and the remaining 78,810 in cities or towns of less than 30,000 inhabitants.¹⁵⁶

What the foregoing analysis underlines is that if bilingual justice is to depend on population figures related to a given geographic area, the temptation might be strong to gerrymander a potentially bilingual jurisdiction into oblivion by rearranging judicial districts and divisions. The American and Canadian experience with electoral districts demonstrates beyond doubt that this is not a mere possibility, but could even be described as a probability in the absence of strong safeguards. Conversely, minority groups might be

tempted to require unrealistic territorial readjustments to qualify for bilingual administration of justice. If their wishes were respected, large, unwieldy judicial districts might appear, creating an injustice for the majority. These are all real dangers which compound the various practical difficulties of bilingual justice pointed out in the present chapter, not to mention the problems of administering bilingual justice with unilingual statutes! While we believe that all these drawbacks can be overcome, we can only recommend caution and the institution of all possible safeguards. The creation and maintenance of bilingual judicial districts will prove to be an enormously complex task demanding the reconciliation of divergent claims and conflicting interests. Its supervision might very well have to be entrusted to a neutral constitutional court or commission whose function it might be to insure that the legitimate claims of the minority be respected without depriving the majority of its own rights.

A. Historical Background

1. Juries and language rights

5.01. The right to trial by jury is the right to be tried by one's peers. It is an ancient and hallowed right secured in the Magna Carta. One of its aspects can be the right to be tried by jurors speaking one's own language. As we shall see, this right was considered sufficiently important in England from the thirteenth century until at least 1870, and in Newfoundland until that date, to entitle even aliens or foreigners to demand a jury *de medietate linguae*, that is a jury half of whose members were aliens. In Canada the situation has been complicated by the coexistence of two great ethnic groups. When legislators and judges have had to concern themselves with the linguistic aspect of the right to trial by jury, it has been essentially in order to determine the extent to which a French-speaking or English-speaking party could insist on a jury of his own language. We shall have occasion to see that the rule can carry from an absolute right to be tried in one's own language to a mere right to a mixed jury (*de medietate linguae*) or even a complete denial of the right to be tried by a jury whose language is different from that of the majority in the area. Only in Quebec does a possibility exist for a Francophone or Anglophone to request trial by his linguistic peers. In Manitoba the Criminal Code recognizes only a right to a mixed jury. The right to a civil mixed jury was abolished in Manitoba in 1890.

5.02. If the right to a jury is treated as a substantive matter rather than one of procedure, then the whole subject of jury trial falls within exclusive provincial jurisdiction under section 92(14) of the British North America Act—at least in so far as civil and criminal courts are concerned. Naturally, the Parliament of Canada could always create federal jury trials under the power granted to it by section 101 of the Act to establish additional courts for the better administration of federal law. We know that it has not done so, except for the creation of the Supreme and the Exchequer Courts. If, on the

other hand, the right to a jury trial is considered to be a question of procedure, then both the provincial and federal legislatures would have jurisdiction depending on the subject-matter, and the federal Parliament would have exclusive jurisdiction over criminal juries under section 91(27) of the B.N.A. Act.

Up to the present the question has been treated as one of procedure. Hence the right to jury trial in criminal matters has been regulated by the Criminal Code. The constitutional expert Bora Laskin writes:

The mode of trial, whether jury or non-jury, involves constitutional questions where federal matters are triable in provincial courts. While in the absence of specific federal legislation, provincial modes of trial will apply to federal civil causes of action or proceedings, the express reservation to the Dominion of procedure in criminal matters has resulted in a number of problems respecting the use of grand and petit juries in criminal proceedings. It is clear that it is for Parliament alone to determine whether jury trial should be available in criminal prosecutions and, if so, the number to constitute the jury and the number by whom a verdict shall be given. . . . Equally is it for Parliament to determine whether a special jury shall be available in a criminal trial. . . . The situation should be no different in respect of the use of a grand jury, but it has been held that while the selection or qualification and summoning of grand jurors, and the number by whom a bill may be found is a matter for Parliament alone, . . . the number of jurors returned to serve on a grand jury is a matter for the Province as pertaining to the constitution of the provincial court. . . . The fact that Parliament has, in respect of jury matters, legislated by reference to or adoption of provincial legislation (see Cr. Code, s. 534) does not militate against its independent competence.¹

Apart from this question of jurisdictional competence, there is no constitutional guarantee in Canada of trial by a jury composed either entirely or partly of members of one's own language group. Indeed, the only provision of the B.N.A. Act dealing with the language of court proceedings (section 133) provides for the limited right to use either French or English "in any Pleading or Process in or issuing from any Court of Canada under this Act and in or from all or any of the Courts of Quebec." The language of section 133 would have to be stretched almost unreasonably if one were to interpret it as guaranteeing a right to a jury of one's own language. Section 133 provides no such guarantee any more than it does with respect to the language of the judge. Its wording only permits a party in a federal or Quebec court to use French or English. If either the bench or the jury do not understand the language used by such party, section 133 might be said at best to require interpretation. As it is worded we believe that it does not adequately cover the question of jury trial. In fact we should recommend that the possibility of a constitutional amendment be considered if it is deemed insufficient to leave the matter to the discretion of the federal Parliament or of the various provincial legislatures.

As we shall see in this chapter, only Quebec and Manitoba still provide for mixed criminal juries, and Quebec also recognizes the right to be tried by a jury consisting entirely of citizens speaking either English or French, as the case may be. This right also exists in Quebec with respect to civil suits. No other jurisdiction in Canada allows for anything but English-speaking juries. This raises the question of the validity of jury proceedings in the Northwest Territories and in the Yukon. As we have seen French was

never legally abolished in the Northwest Territories and is still an official language. Furthermore, we came to the conclusion that the Territorial Court and the Court of Appeal for the Territories, and perhaps even the Police Magistrates' Courts there, are courts created by the federal Parliament and so fall within the scope of section 133 of the B.N.A. Act. If this is so, one may legitimately raise doubts as to the legality of unilingual English juries in the Territories. Indeed, the Jury Ordinance² stipulates that the only persons qualified for jury service are those who are "able to speak and write the English language." The same remarks could be made about the position of juries in the Yukon, the courts of which also seem to fall within the definition of "Courts of Canada" governed by section 133 of the B.N.A. Act.³

5.03. Although there is no legislative enactment on mixed juries before the year 1787 in Canada, the institution of mixed juries dates back to the time of King Ethelred of England.⁴ In a statute entitled *de Monticolis Wallei* it was ordained that in cases between the Anglo-Saxons and the Wallei the jury should be composed of 12 legal men of whom six were to be Anglo-Saxons and six were to be Wallei. The 1354 statute of 28 Edward III, c.13, s.2, enacted:

That all manner of inquests and proofs which be to be taken or made amongst aliens and denizens, be they merchants or others, as well before the Mayor of the Staple, as before any other Justices or Ministers, although the King be party, the one-half of the inquests or proofs shall be denizens, and the other half aliens, if so many aliens and foreigners be in the town or place where such inquest or proof is to be taken, that be not parties, nor with the parties in contracts, pleas, or other quarrels, whereof such inquests or proofs ought to be taken; and if there be not so many aliens, then shall there be put in such inquests or proofs as many aliens as shall be found in the same towns or places which be not thereto parties, nor with the parties, as aforesaid; and the remnant of denizens, which be good men, and not suspicious to the one party, nor to the other.⁵

This enactment, enforced by the 1429 statute of 8 Henry VI, c.29, and sanctioned by the jurisprudence of the British courts during more than four centuries, formed part of the body of English criminal law introduced into this country when it was ceded to England by the King of France.⁶ The institution of juries *de medietate linguae* survived in England until 1870. In effect, it resulted from the recognition of the right of aliens to have at least half the jury trying them composed of aliens. However, it should be noted that despite its name such a jury did not necessarily have to be composed of aliens who came from the same country and spoke the same language as the accused.⁷ It was abolished by the 1870 Naturalization Act.⁸

2. New system of judicature, 1764

5.04. The ordinance of September 17, 1764, establishing a new system of judicature provided that in the Court of King's Bench all His Majesty's subjects in the colony were to be admitted on juries without distinction. French Canadians were, therefore, allowed to serve on these juries. This scheme met with much opposition from the English merchant class who organized a formal protest contained in a document known as the "Presentments of Protestant Grand Jurors of Quebec," dated October 16, 1764. The

jurors expressed their objection to the indiscriminate commission of Canadians, that is to say French Canadians, on King's Bench juries. The opinions expressed in the "Presentments" foreshadow the introduction into Quebec of the institution of mixed juries as it is known today. The grand jurors objected to participation of Roman Catholic jurors in trials between Protestants. They conjectured that the Catholic inhabitants might have similar reservations as to the participation of Protestant jurors in cases between Roman Catholics. These objections, manifestly founded on religious considerations, were probably based on linguistic grounds as well, for apart from whatever feelings of prejudice and intolerance they may have harboured, the grand jurors most certainly would have wished to avoid the disadvantages attendant upon a jury's incomprehension of court proceedings. The French-speaking jurors answered this objection by pointing out that it was contrary to the purpose of the Governor's ordinance, which recognized the necessity of establishing a jurisdiction where the new subjects could be judged according to their customs and in their own language. They stated that it seemed far more equitable that the new subjects be heard by persons whom they understood and by whom they could be understood. Moreover there was no English advocate who knew the French language well enough to manage without an interpreter and because of this the French Canadians would incur exorbitant costs.⁹ The "Presentments" and the answers thereto were submitted in a report to the Lords of the Committee for Plantation Affairs. In regard to allowing entire French-Canadian juries in cases where the dispute was between a British-born subject and a French Canadian, the Committee came to the conclusion that "under the present circumstances of this Province, we are of opinion, it would have been advisable to have enacted, that in all cases where the action lay between a British-born subject and a Canadian, an equal number of each should have been impanelled upon the jury if required by either party."¹⁰ Consequently, on February 17, 1766 royal instructions were sent to Governor Murray. They provided that in cases where all the parties were British-born subjects the jury was to consist of British-born subjects only. In cases between a British-born subject and a French Canadian there was to be an equal number of British subjects and French Canadians, if this procedure was required by the parties. Canadian subjects were to be permitted to practise in all courts as barristers, advocates, attorneys, and proctors:

It is . . . our Royal will and pleasure and you are hereby directed and required, forthwith upon the receipt of this our Instruction, to enact and publish an ordinance, declaring that *all our subjects in our said Province of Quebec without distinction are intitled to be empanelled, and to sit and act as jurors, in all causes civil and criminal* cognizable by any of the Courts of Judicature within our said Province; and also declaring that for the more equal and impartial distribution of Justice in civil causes or actions between British born subjects and British born subjects, the juries in such causes or actions are to be composed of *British born subjects only*; That in all causes or actions between Canadians and Canadians the juries are to be composed of *Canadians only*; And in all causes or actions between British born subjects and Canadians the juries are to be composed of *an equal number of each*, if required by either of the parties in any of the above mentioned instances; And it is our further will and pleasure that it be also declared by the said ordinance, that our Canadian Subjects shall be permitted and *allowed to practice, as Barristers, Advocates, Attornies and Proctors*, in all or any of the Courts within our said Province,

under such regulations as shall be prescribed by the said Courts respectively for persons in general under those descriptions; . . .¹¹

Consequently on July 1, 1766 Governor Irving, who had replaced Murray during the latter's recall to London, issued a new ordinance of judicature setting out the right of Canadians to sit on all juries, a new jury system, and the right of Canadians to practise law:

It is hereby Ordained and Declared, That all His Majesty's Subjects in the said Province of *Quebec*, without Distinction, are intituled to be impannelled, and to sit and act as Jurors in all Causes civil and criminal cognizable by any of the Courts or Judicatures within the said Province.

And for the more equal and impartial Distribution of Justice, *Be it further Ordained and Declared, by the Authority aforesaid*, That in all Civil Causes or Actions between British born Subjects and British born Subjects, the Juries in such Causes or Actions are to be composed of British born Subjects only; And that in all Causes or Actions between Canadians and Canadians, the Juries are to be composed of Canadians only; and that in all Causes or Actions between British born Subjects and Canadians, the Juries are to be composed of an equal Number of each, if it be required by either of the Parties in any of the abovementioned Instances.

And be it further Ordained and Declared, by the Authority aforesaid, That His Majesty's Canadian Subjects shall and are hereby permitted and allowed, to practice as Barristers, Advocates, Attornies and Proctors in all or any of the Courts within the said Province, under such Regulations as shall be prescribed by the said Courts respectively for Persons in general under those Descriptions.¹²

In a report of the Board of Trade dated July 10, 1769 relative to the state of the Province of Quebec, there is a reversal of the policy contained in the Royal Proclamation of 1763. This report recommended that instead of empanelling Canadian subjects on juries indiscriminately with natural-born British subjects, their admission should be allowed with a proviso that all criminal offenses should be tried by juries *de medietate linguae*, composed of natural-born Canadian subjects, except in cases where the accused was English-speaking, or where a Canadian stood charged with murder, in which cases all the members of the jury were to speak the language of the accused.¹³

The Quebec Act of 1774 wiped out the Proclamation of 1763 and all the ordinances of the Governor and Council of Quebec relative to civil government and the administration of justice.¹⁴

3. Institution of mixed juries

5.05. In 1787 there appeared the first legislative enactment on mixed juries. It can be regarded as a precursor of today's provisions for mixed juries in the Criminal Code. It was the ordinance of February 26 to regulate proceedings in certain cases in the Court of King's Bench and to create the right of appeal from large fines. It also provided for mixed juries in criminal cases. There were to be on any jury at least six jurors who could understand the language of the defence of the party prosecuted; that is to say, the language, whether English or French, employed by the accused's lawyer.¹⁵

5.06. Shortly after the province of Upper Canada was created by the Constitutional Act of 1791, a statute was passed to establish trials by jury. This statute virtually

abolished mixed juries in Upper Canada.¹⁶ The institution of mixed juries has never been revived in Upper Canada and its successor, the province of Ontario.

5.07. Under the Act of Union the institution of mixed juries was retained in Lower Canada. In An Act to regulate the summoning of Jurors in Lower Canada,¹⁷ it was provided that aliens could be jurors only when a jury *de medietate linguae* was requested and obtained. In 1851 this act was amended.¹⁸ As a result of the complaints directed towards mixed juries in Lord Durham's Report elaborate procedures for mixed jury trials in civil and criminal cases in the Quebec and Montreal districts were set out. In order that there be less tampering with the composition of the jury, the act provided that of the grand jurors and petit jurors to be summoned to serve in any criminal court in Montreal or Quebec, half should be persons speaking the English language and the other half persons speaking the French language. Separate lists were to be kept of English and French jurors, and the selection of grand jurors was to be made therefrom. The act also provided that mixed juries would be the exception rather than the rule, and that as far as possible the language of the jury would be that of the defence. If there were not enough persons skilled in the language of the defence the trial was to be postponed. The act further set out the modalities of the right to a mixed jury in civil cases. The provisions of the act were repeated in an Act respecting the selecting and summoning of Jurors.¹⁹ In 1864 the Parliament of Lower Canada passed an act known as the Canada Jury Act, 27-8 Vic., c.41, the provisions of which were similar to the previous statute. Under section 129 of the British North America Act this act remained in force after Confederation.

The British North America Act also conferred on the Dominion government jurisdiction over criminal procedure. The statute known as the Canada Jury Act was repealed by the statute 46 Vic., c.16. However, since criminal procedure was at that time a matter under federal jurisdiction, the statute repealing the Canada Jury Act could not have repealed those provisions falling under Dominion jurisdiction. Therefore, the enactment contained in the Canada Jury Act which gave the right to accused persons whose language was either English or French to have a mixed jury remained in force.²⁰ This provision is still in force today. Section 535 of the Criminal Code does not directly confer this right. All it does is establish the procedure by which the right is to be enforced. The provisions of the Canada Jury Act with respect to civil juries are now found with several modifications in articles 338 and following of the new Code of Civil Procedure.

5.08. Until 1869 the institution of the jury *de medietate linguae* was used in respect to aliens. In *R. v. Miller*, decided in 1855,²¹ a German-speaking accused who could speak neither French nor English and who was a German national asked for a jury composed half of natives, that is of Canadian citizens, and the other half of aliens like himself. The motion was granted. In 1866, in the case of *R. v. Vonhoff*, the same events occurred. At the time of the trial the Canada Jury Act was in force. The court granted the motion for a jury *de medietate linguae* and ordered that a writ of *venire facias* be issued to summon 36 aliens speaking the German language, which the accused spoke, if so many could be found in the district where the trial took place. In 1869 in the Act respecting procedure in criminal cases²² the right for an alien to be tried by a jury *de medietate linguae* was abolished and it was thereafter provided that he should be tried in the same manner as a British citizen. This provision was carried into the act in the Revised Statutes of Canada

of 1886²³ and incorporated into the Criminal Code of 1892 in section 663. It was repeated in the Criminal Code of 1906 in section 922. The present Criminal Code contains no provisions in respect of the jury *de medietate linguae* for aliens.

5.09. The Province of Manitoba was established in 1870.²⁴ The same year there was passed an Act to extend to the Province of Manitoba certain of the criminal laws now in force in the other Provinces of the Dominion,²⁵ which made provision for the right of an accused to a mixed jury in Manitoba criminal cases. The right to a mixed jury was recognized in various subsequent Manitoba statutes.²⁶ In 1876, the Act respecting Jurors and Juries provided that the parties could waive by consent the right to a mixed jury.²⁷ In 1881 an Act for dividing the Province of Manitoba into Judicial Districts and establishing Courts therein²⁸ provided for mixed juries in both criminal and civil cases. Two years later, the Administration of Justice Act²⁹ provided for the right to exclusively French juries where possible, but limited its application to the eastern judicial district only. During the following years there were further technical changes made in jury provisions.³⁰ The end of mixed civil juries came in Manitoba in 1890 when French was abolished by statute as an official language.³¹

5.10. Newfoundland, which only became part of Canada in 1949, appears to have possessed juries *de medietate linguae*, at least until 1870. In 1876 the Newfoundland Supreme Court, in the case of the *Queen v. Melendez*,³² stated that in the absence of specific Newfoundland legislation, the right to a jury *de medietate linguae* depended on its existence in English law at that time³³ and that the 1870 Naturalization Act had abolished such juries for aliens in England. Newfoundland legislation contained no provision dealing with such type of jury. The Trial by Jury Act³⁴ was silent on the point. A few years later the law was amended specifically to exclude such juries. We have not been able to determine the exact year of its enactment, but the Trial by Jury Act contained in the 1892 Consolidated Statutes of Newfoundland states: "The right of an alien to be tried by a jury *de medietate linguae* is hereby abolished, and he shall be tried in the same manner as if he were a natural born subject of Her Majesty."³⁵ This prohibition still appears today in the statutes of Newfoundland.³⁶

B. Juries in Criminal Cases

1. In Quebec

5.11. Quebec and Manitoba are the only provinces in which the accused in a criminal case can demand a jury composed of individuals, all or some of whom speak his language. Section 535, dealing with juries in the province of Quebec, states:

535. (1) In those districts in the province of Quebec in which the sheriff is required by law to return a panel of petit jurors composed one-half of persons who speak the English language and one-half of persons who speak the French language, he shall in his return specify in separate lists those jurors whom he returns as speaking the English language and those whom he returns as speaking the French language, and the names of the jurors summoned shall be called alternately from those lists.

(2) In any district referred to in subsection (1) the accused may, upon arraignment, move that he be tried by a jury composed entirely of jurors who speak the language of the accused if that language is English or French.

(3) Where a motion is made under subsection (2), the judge may order the sheriff to summon a sufficient panel of jurors who speak the language of the accused unless, in his discretion, it appears that the ends of justice are better served by empanelling a mixed jury.

The right to a mixed jury or a jury of one's own language provided for in this section is thus made subject to the Quebec Jury Act.³⁷ The relevant sections of this act are:

26. In the district of Montreal, the sheriff is required to summon mixed juries, composed as provided in section 30, and, in the other districts, ordinary juries as provided in section 29.

27. Nevertheless a judge of the Superior Court sitting for the district may, whenever he deems it advisable and at any time before the formation of a panel of jurors, order an ordinary jury to be summoned in the district of Montreal or a mixed jury in any other district.

If there be no judge present in the district at the time, the application may be made to a judge qualified to preside over the court in Quebec or in Montreal, according to the appellate division to which the district in question belongs.

Such order shall remain in force as long as it has not been amended or revoked by the judge.

28. The panel of jurors, in the case of an ordinary jury, must comprise forty regular jurors and twelve supplementary jurors.

In the case of a mixed jury, it shall comprise sixty regular jurors and twenty supplementary jurors.

29. When an ordinary jury has to be summoned, the sheriff shall draw up the panel of jurors by entering thereon the requisite number of names in the order in which they appear on the list prepared at the drawing of lots contemplated in sections 35 and following.

30. When a mixed jury has to be summoned, the sheriff shall draw up the panel of jurors in the manner provided in section 29, but by taking jurors speaking the English language and jurors speaking the French language, in equal numbers, in the order in which they respectively appear on the two lists prepared at the drawing of lots contemplated in sections 35 and following.

31. In districts in which a mixed jury cannot be summoned without an order as contemplated in section 27, any judge having authority to preside over the court may, if he deem it expedient, upon application for a jury *de medietate linguae*, authorize the sheriff of the district to summon a mixed jury.

If there be no judge present in the district at the time, the application may be made to a judge qualified to preside over the court in Quebec or in Montreal, according to the appellate division to which the district in question belongs.

In the case contemplated in this section, the summoning shall be done at least forty-eight hours before the date and hour fixed for the appearance of the jurors.

32. When jurors with special qualifications as to language are required, such qualifications must be entered opposite the name of each juror on the panel, and such entry shall be *prima facie* evidence of the existence of such qualification.

In other words, in the province of Quebec the sheriff is required by law to summon mixed criminal juries only in the district of Montreal (except when a judge of the Superior Court orders otherwise) and in other judicial districts upon the order of a

Superior Court judge. If we read section 535 of the Criminal Code together with the pertinent sections of the Quebec Jury Act, we find the law to be as follows: a) the accused can move that he be tried by a jury composed entirely of jurors who speak his language if it is English or French; b) if the judge decides that "the ends of justice are better served by empanelling a mixed jury" he can nevertheless so order; c) in districts other than that of Montreal, while the accused has no right under the law to insist upon a jury of his own language, he is entitled, at least, to move for a mixed jury.

5.12. The somewhat confused rules of section 535 of the Criminal Code and of the Quebec Jury Act have been interpreted by the courts as follows.

a) The right of an accused to a trial by jury composed entirely of persons who speak his own language when that is either English or French is not absolute;³⁸ but the accused's request for a jury composed entirely of persons speaking his language should be refused only for special reasons.³⁹ In other words, the request for such jury should be granted unless there are special reasons to refuse it. Although the court must respect the primary rights of the accused, he must not overlook those of society.⁴⁰

b) The right to a mixed jury is absolute only as the law authorizes a choice between a French-speaking and an English-speaking jury and the accused must have been allowed first to move for a jury entirely in his own language.⁴¹ As we have seen in the previous paragraph, if a motion for such a unilingual jury is refused, the judge must at least order the empanelling of a mixed jury. If the accused speaks at least one of the official languages, he has at least the right to a mixed jury, even if he is a foreigner.⁴² The language of the accused's counsel is irrelevant.⁴³

c) Nevertheless, if the accused speaks English and French equally well, he cannot object if the court orders a jury composed entirely of members speaking one of those languages.⁴⁴

d) If the accused speaks one of the official languages, he cannot ask for a jury composed entirely of persons speaking the other language.⁴⁵ In a recent case in Montreal a bilingual accused was ordered to stand trial for murder before an English-speaking jury even though he expressed a preference for a French-speaking one.⁴⁶ During the hearing on the Crown's motion for an all-English jury the accused stated that he was brought up in Ontario, where he received all his schooling in English, but that French was the exclusive language in his home. The judge concluded upon the evidence that the accused was more fluent in English than in French and ordered the empanelling of an English-speaking jury despite the accused's protest that "I am a French Canadian and I want to be judged by French Canadians."

e) The composition of a jury is determined according to the familiarity of the jurors with the relevant language and not with their ethnic origin.⁴⁷

f) We have seen that the right of aliens to a jury *de medietate linguae* composed partly of aliens no longer exists in Canada. It has been held that if the accused speaks only a foreign language and neither French nor English, he can be tried by a jury composed entirely of either Francophones or Anglophones.⁴⁸ If he speaks English or French fluently, in addition to a foreign language, the court can order a jury composed entirely of Anglophones or Francophones.⁴⁹

g) A number of decisions have also been rendered in connection with the procedure

for mixed juries. For instance, it has been held that it is permissible in empanelling a mixed jury to first admit to the jury six jurors speaking the language of the defence before calling any jurors of the other language; it is not necessary to call them alternately.⁵⁰ However, once an accused has asked for a mixed jury and his motion has been granted, he has no right to move for revocation of the order although the court can use its discretion so to do.⁵¹ If all members of a mixed jury speak the language of the accused in addition to the other language for which they are officially empanelled, and all the proceedings are carried on in the language of the accused, the omission to use the other official language during the proceedings does not invalidate them, particularly if the accused has not objected throughout the trial.⁵² On the other hand, a trial and verdict will be set aside on appeal if it is discovered that although one-half the jury was ostensibly sworn in as being French-speaking, one of those French-speaking jurors did not, in fact, know the language.⁵³

2. *In Manitoba*

5.13. Section 536 of the Criminal Code provides for the right to a mixed jury in Manitoba as follows:

536. (1) Where an accused who is arraigned before the Court of Queen's Bench for Manitoba demands a jury composed at least half of persons who speak the language of the accused, if that language is either English or French, he shall be tried by a jury composed at least one-half of the persons whose names stand first in succession upon the general panel and who, not being lawfully challenged, are found, in the judgment of the court, to speak the language of the accused.

(2) Where, as a result of challenges or any other cause there is, in proceedings to which this section applies, a deficiency of persons who speak the language of the accused, the court shall fix another time for the trial, and the sheriff shall remedy the deficiency by summoning, for the time so fixed, the additional number of jurors who speak the language of the accused that the court orders and whose names appear next in succession on the list of petit jurors.

The Manitoba Jury Act⁵⁴ does not provide, however, for the implementation of the right granted in section 536. We have not been able to ascertain the manner in which mixed juries are in fact summoned and empanelled in Manitoba. Further research is needed in this area.

5.14. There is only one reported case dealing with language problems in jury trials in Manitoba. In *R. v. Earl*⁵⁵ a Crown case was reserved on the question whether the fact that one of the 12 jurors did not thoroughly understand the English language was sufficient to cause a mistrial. Throughout the trial one of the jurors had not indicated in any way that he did not understand anything that was being said, but afterwards he signed an affidavit stating that he did not speak English well enough to understand all the evidence, the addresses of counsel, and the judge's charge. The Court in Banc held that this evidence, coming after trial, was too late, and that mistrial could not be declared, nor could a new trial be granted on that ground. Moreover, the court held that ignorance of the English language was not a ground of challenge of a juror under the relevant Manitoba laws as they then stood. A juror should know either French or English, not both, in a

mixed jury. All that could have been asked for was the translation of the proceedings for the benefit of the juror in question.

3. *Other provisions*

5.15. We also draw attention to the other relevant provisions in the Criminal Code dealing with mixed juries in Quebec and in Manitoba.

544. Where an accused who is charged with an offence for which he is entitled to twenty or twelve peremptory challenges in accordance with this Part is to be tried pursuant to section 535 or 536 by a jury composed one-half of persons who speak the language of the accused, he is entitled to exercise one-half of those challenges in respect of the jurors who speak French.

579. No omission to observe the directions contained in any Act with respect to the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, or the drafting of panels from the jury lists, is a ground for impeaching or quashing a verdict rendered in criminal proceedings.

580. Nothing in this Act alters, abridges or affects any power or authority that a court or judge had immediately before the coming into force of this Act, or any practice or form that existed immediately before the coming into force of this Act, with respect to trials by jury, jury process, juries or jurors, except where the power or authority, practice or form is expressly altered by or is, inconsistent with this Act.

5.16. The operation of a mixed jury system creates a number of obvious practical difficulties, some of which have given rise to the jurisprudence summarized in the previous section of this chapter.⁵⁶ There are also problems which have not yet led to reported court decisions but which should be investigated by querying practitioners and judges. Unfortunately, we did not have the time to do so for this research project. However, two of these problems came vividly to light in 1964 during the Royal Commission of Inquiry into the Coffin Affair headed by Mr. Justice Roger Brossard. Wilbert Coffin had been tried for murder at Percé, Quebec in 1954. His request for an English-speaking jury was refused because in the judicial district where the trial took place, only about 15 per cent of the population was English-speaking, and the judge decided, on that basis, that the ends of justice would not be served by excluding from the jury the other 85 per cent of the population who were French-speaking. He therefore ordered the empanelling of a mixed jury. Nevertheless, in that district it was extremely difficult, if not impossible, to find within forty miles from Percé enough qualified English-speaking persons for even a mixed jury. Mr. Justice Brossard observed⁵⁷ that if the territorial limits set by the Jury Act for selection of potential jurors had been wider, an English-speaking jury could have been formed. To remedy such a situation and prevent it from recurring in other districts where it might arise, Judge Brossard suggested that if at all possible a unilingual jury ought to be preferred to a mixed one, and that the choice of the jury's language should be left entirely to the accused, whatever his language, since in Quebec both English and French are official. He further suggested that the law should be amended to provide for this and to remove from the trial judge the burden of deciding whether or not, because of purely administrative reasons, the ends of justice would be

better served by a mixed jury in preference to a unilingual one. At the present time, section 535(3) of the Criminal Code leaves it to the discretion of the trial judge. We cannot but agree with the recommendations of the Royal Commission. In addition, Mr. Justice Brossard noted that the law does not define clearly the extent to which a juror must know French or English to qualify as knowing that language and that it does not specify that the jury's language must be that principally spoken by the accused. As a result, in Coffin's trial, two persons bearing English names, but speaking French rather than English, were chosen as supposedly English-speaking members of the mixed jury. Mr. Justice Brossard suggested that the Jury Act be amended to clarify these points. This has not been done as yet.

C. Civil Juries

1. Quebec Code of Civil Procedure

5.17. Quebec appears to be the only jurisdiction in Canada providing for a choice in the language of civil juries (as against criminal juries which are governed principally by federal law). Article 436 of the Quebec Code of Civil Procedure used to permit the parties to move for a jury composed entirely of French- or English-speaking members, as the case may be, when all the parties speak one language or when one of them speaks neither French nor English, and for a mixed jury when the parties speak different official languages.

5.18. The Code was replaced in 1965 by a revised Code.⁵⁸ This provides for rights similar to those embodied in the former Code with the proviso that the criterion is now "the language habitually spoken" by the parties. Furthermore, the decision is made with reference only to the language of physical persons and not of corporations. Article 333 states that the motion for jury trial must state "the language habitually spoken by the parties." The court then decides whether the jury will be of the French language, of the English language, or mixed.⁵⁹ The rule itself is given in articles 338 and 339:

338. The jury is composed of six persons all speaking the French or the English language, if such is the language habitually spoken by all the parties. In all other cases, unless the parties have agreed on a jury composed exclusively of persons speaking the French or the English language, the jury is mixed, that is, composed one half of persons speaking the French language and one half of persons speaking the English language.

339. The composition of the jury is determined without consideration of parties which are not physical persons. If all the parties are corporations and do not agree as to the composition of the jury, the court decides according to the circumstances, and no appeal lies from its decision.

These articles can be read as setting out the following rules:

- 1) If both parties are of the same language, the jury is of that language;
- 2) If one party is French and the other one English, the jury is mixed unless the parties agree otherwise;

3) If one of the parties is a corporation and the other one a physical person, it is the latter's language which is determining;

4) If both parties are corporations, the court's decision according to the circumstances is final when there has been no prior agreement.

The panel which is summoned consists now of only 30 persons.⁶⁰ Articles 351 and 352 are also innovations:

351. One or two alternate jurors, depending upon whether the jury is of one language or mixed, may be summoned and sworn, if the judge so orders.

An alternate juror replaces any member of the jury who, before the end of the trial, becomes unable or incompetent to act. He is considered in all respects as a member of the jury, except that he will be dismissed as soon as the trial has ended, if his services have not been required.

352. The two opposing parties are each entitled to challenge four jurors peremptorily. If the jury is mixed two of each language may be challenged.

Co-plaintiffs or co-defendants must unite to exercise such right of challenge.

Further proof of the complexities of mixed juries is found in article 371: "When the evidence has been completed, the judge formulates for the jury the questions to which they must reply. The prothonotary writes them down and distributes copies to the judge, the jurors, and the attorneys. If the jury is mixed, the questions are drawn up in both languages." The following comments by the Commissioners are worthy of note:

The Commissioners have carefully studied all the aspects of the question but have been unable to come to a unanimous conclusion. Two of them recommend the abolition of jury trials while Commissioner Challies is of the contrary opinion. All three, however, are in agreement to suggest new rules for this mode of hearing in case the Legislature decides to retain it. In addition to simplifying considerably the procedure the adoption of the proposed texts would bring several changes to the existing law: the cases in which a trial by jury may be had are less numerous (Art. 332); the right to a jury trial would no longer be absolute, with the Court always being able to refuse it because of the technical nature of the proof or for any other valid reason (Art. 337); the jurors, who would be only six in number, would only be able to decide questions of fact (Art. 338); and in deciding the composition of the jury, only the language of physical persons would be considered.⁶¹

So far as they are not modified by the Code of Civil Procedure, the provisions found in the Jury Act⁶² governing the qualification, election, and organization of juries are still applicable. However, for our purposes, they do not present any great interest.

5.19. The provisions of the former Code of Civil Procedure gave rise to an abundant jurisprudence, some of which is however no longer applicable:

a) *The position of corporations.* The right of a corporation to ask for a mixed jury used to be an absolute one⁶³ which it could waive if it saw fit.⁶⁴ Any corporation, even a municipal corporation or city, had the right to demand a mixed jury.⁶⁵ Under article 339 of the new Code corporations can still agree as to the linguistic make-up of the jury, but otherwise the court decides according to the circumstances, and it can order either a unilingual or a mixed jury as it deems best. While under the old Code it had been held that where a corporation became a party to a suit after a unilingual jury had been granted to the other parties, and the corporation moved for a mixed jury, the motion should be granted,⁶⁶ it is doubtful that the decision would now be the same under article 339.

The survival of some other jurisprudence is also questionable. For instance, it was decided that a corporation is free to have a unilingual jury if it so wishes, and the opposite party, if it is not a corporation, cannot object if the jury speaks his language.⁶⁷ When a unilingual jury is to be empanelled in a case involving a corporation, it had been held that the language of a corporation is determined by the language of its minutes⁶⁸ unless the corporation declares otherwise.⁶⁹ Where a corporation in a suit declared itself to be English-speaking and the other party was French-speaking, a mixed jury was ordered.⁷⁰ Under article 339 today the jury might probably be ordered to be French-speaking.

b) Unilingual juries. The jurisprudence dealing with the rights of parties other than corporations is not as likely to be abandoned. We summarize its holdings. When both parties speak the same language, the court must not grant a motion for a mixed jury.⁷¹ Where one of the parties speaks English or French and the other speaks neither language, a unilingual jury will try the case.⁷² However, where a party speaks one of the official languages and it is not his "mother tongue" the jurisprudence is divided over whether or not to grant a mixed jury in the event that the other party does not speak the same language. In *Chicoine v. Gordon*⁷³ Chicoine spoke only French and Gordon spoke English, but his mother tongue was Hebrew. Gordon moved for a mixed jury because article 436 of the former Code of Procedure provided for it, where one party spoke French and the other English. The motion was denied because the judge held that any reference to the language of a party in article 436 meant his mother tongue and, therefore, in order for a mixed jury to be granted, the mother tongues of the parties had to be English and French. Since Chicoine's language was French and Gordon's mother tongue was neither French nor English, the judge, in accordance with the first paragraph of article 436, granted an all-French jury.

It would be interesting to speculate what the decision would have been under the new Code's reference not to mother tongue but to "the language habitually spoken by . . . the parties." Even under the former Code, the criterion of mother tongue was not necessarily followed, since in *Filiatrault v. Yaffe*, in circumstances similar to those in *Chicoine v. Gordon*, a mixed jury was granted, and the mother tongues and origins of the parties were held not to be criteria upon which the language of a party is to be determined; rather the criterion was which of the two official languages a party had adopted. As Mr. Justice Rinfret observed,

To interpret otherwise article 436 would seriously affect the rights guaranteed to New Canadians upon their arrival in this country.

Among the rights they have acquired is certainly the right to be heard before the courts in their adopted language—French or English, whichever they choose.

To refuse the exercise of this right and, under pretext that the New Canadian's mother tongue is neither French nor English, to compel him to carry on legal proceeding in a language other than the one he has learned—French or English—would constitute, in my view, a denial of right which the Legislature could not approve.⁷⁴

The "parties" referred to in article 436 and in the present article 338 need not be opponents. If two co-plaintiffs or co-defendants speak different languages, then as long as

those languages are English and French a mixed jury will be granted.⁷⁵

c) *Linguistic qualifications of jurors.* As for jurors, it is not necessary that their origins be inquired into in order to ascertain their linguistic qualifications: a knowledge of the language required is enough.⁷⁶ Thus, a French-speaking English Canadian is considered a French-speaking juror and an English-speaking French Canadian is considered an English-speaking juror. Familiarity with the language, not ethnic origin, is the key.

Moreover, in challenging an array in a trial by mixed jury the summoning of a juror as English- or French-speaking, when in fact he does not understand the language attributed to him, is not a ground of challenge if that juror is ordered aside. The recognized grounds of a challenge of the array are either partiality, fraud, or wilful misconduct on the part of the officer by whom the panel was returned, or causes of nullity in the summoning of the jurors or in the making up of the lists or panel. The foregoing error does not constitute such ground.⁷⁷

5.20. The new Code leaves a number of practical difficulties unresolved. The jurisprudence cited above indicates that there is still some doubt as to the situation when the "mother tongue" of a juror is neither English nor French. There is no clear criteria as to the required linguistic knowledge to qualify a juror as speaking one or the other language. Nor does the present legislation provide for the situation where all of the parties speak only foreign languages and none of them is a corporation. No reported case has been found covering the latter situation, although the late Mr. Justice O.S. Tyndale, while he was Associate Chief Justice of the Quebec Superior Court, suggested the following solution: "If all the parties are of a foreign language, the Judge shall determine, according to circumstances, whether the jury shall be composed of persons of one or other of the official languages or shall be *de mediatate linguae*."⁷⁸

D. Conclusion

5.21. Although the relative importance of a jury trial has greatly diminished civil cases and although most accused in criminal cases waive their right to a jury trial when they are permitted to do so, the jury institution is still vital and remains as a potential safeguard for parties who want to use it. Consequently it is essential that clear legislation be adopted defining both the right and the manner in which it should be exercised as well as the precise criteria to be used in determining the language of jurors. At the present time we suggest that neither the Criminal Code nor the Quebec Code of Procedure is free from criticism on that account. Furthermore, if any thought be given to extending the right to mixed juries to areas other than Quebec and Manitoba, great care should be taken to find a solution to the various practical difficulties in administering justice in two languages which we have outlined.

6.01. The growth since the beginning of the century of administrative boards and commissions exercising quasi-judicial functions is a phenomenon with which political scientists and lawyers are familiar, but whose social significance is not yet apparent to many laymen. These administrative tribunals not only assume duties which are entrusted to them by modern social legislation—such as that in the field of labour law or pensions—but also tend to take over the solution of traditional juridical problems with which the ordinary courts have been unable to cope satisfactorily (such as workmen's compensation for accidents at work). In other words, we are witnessing both a new type of justice and the removal of classical adjudications from common law courts to more efficient and less formal administrative entities. We are not giving here a value judgement on the change. The growth of administrative justice is a fact with which each citizen must learn to live whether he deplores or welcomes it. The one thing that is certain, however, is that more and more citizens appear before such quasi-judicial boards and commissions or have their rights and duties determined by them. And if past experience teaches us anything, it is that such confrontation will increase in the years to come.

A. The Constitutional Position

6.02. Administrative justice is such a comparatively recent development that it was never even envisaged by the Fathers of Confederation. The British North America Act is completely silent on the subject. One will find nothing in it about who has the power to create such boards and commissions, the power of appointment to them, or jurisdiction over their procedure. The B.N.A. Act refers only to ordinary courts. Section 101 states, "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada." However, this power to create courts for the

administration of the laws of Canada does not extend to the creation of criminal courts since section 91(27) specifically excludes from federal jurisdiction the "Constitution of Courts of Criminal Jurisdiction." Parliament has exercised its power under section 101 at least twice: in the Supreme Court Act,¹ section 3 of which established the Supreme Court as "a general court of appeal for Canada, and . . . an additional court for the better administration of the laws of Canada," and in the Exchequer Court Act.² Theoretically, except for criminal courts and courts having jurisdiction over provincial matters, Parliament could create any type of tribunal other than these two, provided, of course, that such courts were concerned only with applying laws which are within the legal competence of the Dominion.³ All other courts presumably can be created by the provinces, subject naturally to section 96 of the B.N.A. Act⁴ and all the constitutional problems that result from it. As far as procedure is concerned (a matter of great interest to us since the use of languages is normally a question of procedure) the act is not entirely clear. The only provisions to be found in it are the safeguard of federal jurisdiction over criminal procedure in section 91(27) and the recognition of provincial jurisdiction over civil procedure within provincial courts embodied in section 92(14). It would appear, however, that while Parliament could impose a code of procedure for all matters adjudicated under federal laws,⁵ the practice has been to take provincial procedure as it is and apply it. Short of parallel federal and provincial judicial structures, this may be the most pragmatic method except, naturally, before such exclusively federal tribunals as the Supreme Court and the Exchequer Court.

Where do these constitutional rules leave administrative tribunals created by Parliament? Obviously, administrative boards and commissions are not the "additional Courts" contemplated in section 101 of the B.N.A. Act. They are not courts in the ordinary sense of the word and were certainly not what the Fathers of Confederation and the United Kingdom Parliament had in mind when it enacted section 101. Obviously, this does not mean that Parliament cannot create administrative boards or tribunals, since adequate authority could be found in the initial paragraph of section 91.⁶ No one challenges federal jurisdiction any more than doubts are raised about provincial power to create boards and commissions in areas of provincial concern (although, as we shall see, the constitutional position of provincial boards and commissions is somewhat beclouded by section 96 of the B.N.A. Act giving the Governor General the right to appoint judges "of the Superior, District, and County Courts in each Province"). The importance of the distinction between ordinary courts and administrative courts, for our purposes at least, is not so much in this jurisdictional area as in determining whether or not section 133 of the Act applies to them. This section states (in part), that "either the English or the French Language may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act." There is no doubt that section 133 applies to courts created by the Parliament of Canada under section 101, but, if administrative tribunals are not among the courts contemplated by the latter section, then section 133 would not apply to them. This is our opinion. If section 133 does not apply to administrative tribunals, it can be said that there is no constitutional requirement that federal boards or commissions exercising quasi-judicial power be bilingual. It is true, as our survey discloses, that all boards and commissions examined will give some measure of

recognition to the right of French-speaking litigants to use their mother tongue, but this practice is based on goodwill and common sense and not on any constitutional or legislative requirement.

6.03. The purpose of the present chapter is essentially to study the extent to which the more important quasi-judicial federal boards and commissions give recognition to Canada's two official languages, and more particularly the manner in which they deal with French-speaking parties. Since French-speaking litigants are obviously a minority as far as federal boards and commissions are concerned, the next chapter is devoted, for purposes of comparison, to a study of quasi-judicial tribunals in Quebec, where the situation is reversed.

B. Boards and Commissions Sent Questionnaires

6.04. The present chapter is based fundamentally on two questionnaires which were sent to the following 16 boards and commissions: Air Transport Board, Board of Broadcast Governors, Board of Transport Commissioners, Canada Labour Relations Board, Canadian Pension Commission, International Joint Commission, Merchant Seamen Compensation Board, National Energy Board, National Harbours Board, National Parole Board, Restrictive Trade Practices Commission, St. Lawrence Seaway Authority, Tariff Board, Tax Appeal Board, Unemployment Insurance Commission, and War Veterans Allowance Board. All replied. Two stated that they exercised no quasi-judicial function. The International Joint Commission replied that it was an international body originating in the Boundary Waters Treaty of 1909 between the United States and Canada and hence did not fall within the terms of reference of the Royal Commission on Bilingualism and Biculturalism. In a letter to us dated October 4, 1965, Mr. A.D.P. Heeney, the chairman, stated that the Commission is composed of a United States section and a Canadian section, each section consisting of a chairman and two commissioners who are appointed by their respective governments. Two of the three Canadian commissioners are bilingual and the small administrative staff of the Canadian section includes bilingual personnel. Mr. Heeney added:

It is our custom when conducting Hearings in Canada, and with the concurrence of our U.S. colleagues, to permit witnesses to give their testimony in either English or French and to accept briefs and statements in either language. It is also our custom when conducting Hearings in the Province of Quebec to give notice thereof in French as well as English.

You will appreciate that the Commissioners of the U.S. Section, in acceding to the wishes of the Canadian Commissioners in this respect, are doing so as an act of courtesy—which we greatly appreciate.

In reply to a further inquiry about translation of French testimony, Mr. Heeney wrote (in a letter dated July 7, 1967), "The arrangements of the Commission for any necessary interpretation or translation at hearings are quite informal and are undertaken by members of the Canadian section according to circumstances."

The present chapter is based on the replies of the following 13 boards and commis-

sions: Air Transport Board, Board of Broadcast Governors, Board of Transport Commissioners, Canada Labour Relations Board, Canadian Pension Commission, Merchant Seamen Compensation Board, National Energy Board, National Parole Board, Restrictive Trade Practices Commission, Tariff Board, Tax Appeal Board, Unemployment Insurance Commission, and War Veterans Allowance Board.

6.05. An initial questionnaire⁷ was sent to all 16 boards and commissions listed above. It dealt with the linguistic qualifications of the members of the boards and commissions queried and with the language of proceedings before them. The first part was designed to find out the mother tongue of each member of the administrative tribunal and his degree of knowledge of the other language. The second part sought to find out in what language or languages hearings and proceedings were actually conducted, where French-language cases emanated from, what languages were used by members, witnesses, and counsel, what the language of written submissions was, the language of decisions, the facilities for publication of the decisions, and the availability of interpreters and stenographers. Subsequently a further questionnaire was sent to the 13 boards and commissions which had replied to the first questionnaire with a view to finding out whether the language practices indicated in the reply were based on statutory provisions or merely on custom.⁸

6.06. We wish to recommend caution in accepting some of the figures provided in the replies. Indeed the degree of knowledge by board members of the other language was not measured by any objective test, but is an estimate by the official replying to the questionnaires. We have no doubt that these replies were given honestly, but they are no better than estimates by an observer, the accuracy of whose judgement we had no way of testing. This does not mean that the replies are not informative, but we cannot claim scientific accuracy. We believe that at best our statistics are valid approximations.

C. Linguistic Qualifications of Members of Boards and Commissions

6.07. Of the 84 members of the 13 boards and commissions surveyed, the mother tongue of 66 (or 78.5 per cent) was English. Of these 66 officials an extremely small number claimed either good or fair ability in reading, writing, or speaking French. Indeed 38 (57.6 per cent) were said not to be able to write in French at all, and 12 (18.2 per cent) to be able to write in French with difficulty.

The percentages were almost the same for spoken knowledge of French. It is only with respect to reading French that the results are a little more positive, with a little under 10 per cent claiming to read French well, another 21 per cent reading fairly well, 24 per cent reading it with difficulty, and the rest not reading it at all. Subject to the reservations indicated in section 6.06, it is evident that some members believe they have some reading knowledge of French, although they can neither speak nor write the language. It is obvious that an ability to write may not be essential to the conduct of hearings in French, but certainly no English member could hope to conduct hearings in French without at least speaking the language.

Of the 18 French-speaking members surveyed, 16 read, wrote and spoke English well and two fairly well. It appears, thus, that all French-speaking members are fluently, or nearly fluently, bilingual as against about 10 per cent of the English-speaking members.

D. Language Used in Conduct of Proceedings

6.08. When asked whether on occasion they would delegate their members either singly or in a group to hear cases according to language, nine boards replied that they never did so, two stated that they did so "sometimes," one that it resorted to this method "often," and only one that it did so "always." Of the 10 boards replying to the question of whether they ever divided to hear cases in English or in French, eight said that they never did so, one that it did so "sometimes," one that it did so "always," and one did not reply.

When asked whether proceedings before them were conducted in both English and French, 10 boards replied in the affirmative, while two stated that all proceedings before them were in English. One board stated that it did not need to divide since it does not normally hear counsel or conduct hearings as such. However, although 10 boards out of 13 stated that they conducted hearings or proceedings in both languages, these answers should not deceive one into thinking that there is a high percentage of cases conducted in French: only 6.9 per cent of all cases are conducted in French, practically all of them emanating from the province of Quebec.⁹

Table VI.1. Language used by federal boards and commissions in conducting cases, by percentages

Board or commission	English	French	Source of French cases
Air Transport B.	98	2	
B. of Broadcast Governors	75	25	P.Q. (98)
B. of Transport Commissioners	85	15	P.Q.
Canada Labour Relations B.	90	10	P.Q.
Canadian Pension C.	91	9	P.Q. (95)
Merchant Seamen Compensation B.	100	—	—
National Energy B.	98	2	P.Q.
National Parole B.	*	*	P.Q.
Restrictive Trade Practices C.	95	5	P.Q.
Tariff B.	95	5	P.Q.
Tax Appeal B.	92	8	P.Q.
Unemployment Insurance C.	99	1	P.Q.
War Veterans Allowance B.	100	—	P.Q., N.B., N.S., Man.
Average	93.1	6.9	

* Not available.

Of the boards hearing cases in French, only three stated that some of them came from outside Quebec. One board heard 25 per cent of its cases in French, of which 2 per cent emanated from outside Quebec; the second estimated that 5 per cent of the 9 per cent of cases it conducted in French came from provinces other than Quebec; the third stated that a few French-language cases came from the Atlantic provinces and from Manitoba, but had no percentages.

As a rule cases are conducted in English alone or in French alone. There seems to be relatively little bilingualism (*see* Table VI.1). In reply to the question as to whether both languages were ever used in the course of a single hearing before the board by members, witnesses, or counsel, we obtained estimates which, with all due reservations, indicate that the English-speaking participants seldom stray from their mother tongue. In fact, we suspect that most of the bilingualism must come from French-speaking members or counsel.

As another test of bilingualism we requested information as to the language used by French-speaking and English-speaking counsel. Of nine boards replying, four stated that French-speaking counsel usually pleaded in French, and four stated that they did so "sometimes." Six boards indicated that French-speaking counsel usually spoke in English and three stated that English was used only "sometimes." The converse question about English-speaking counsel produced 10 replies: six that English was always used, and four that it was usually used. Four boards stated that English-speaking counsel never used French, and three that they used French "sometimes." All these figures are subject to the reservations outlined in 6.06, but confirm the impression that bilingualism is confined to French-speaking participants in administrative hearings.

In inquiring into the language of written submissions and documents presented to administrative tribunals, we elicited the reply that an average of 91.9 per cent are entirely in English and only 8.1 per cent in French (*see* Table VI.2).

Table VI.2. Language of written submissions presented to federal boards and commissions, by percentages

Board or Commission	Language of submission	
	English	French
Air Transport B.	98	2
B. of Broadcast Governors	75	25
B. of Transport Commissioners	90	10
Canada Labour Relations B.	90	10
Canadian Pension C.	95	5
Merchant Seamen Compensation B.	100	—
National Energy B.	98	2
National Parole B.	75	25
Restrictive Trade Practices C.	95	5
Tariff B.	95	5
Tax Appeal B.	92	8
Unemployment Insurance C.	98	2
War Veterans Allowance B.	94	6
Average	91.9	8.1

The importance of these figures is confirmed by the answers to our question as to the relation between the language of proceedings and the language of prior written submissions. Out of 13 replies received, three boards stated that the language of the proceedings was always the same as that of the written submissions, six stated that this was the case "almost always" and two that this was "usually" so.¹⁰ Eleven boards out of 13 stated that a single decision was delivered in each case. Two boards said that there were occasionally dissenting opinions. When we inquired about the language of the single decision which appears to be the practice, we discovered that 90 per cent of all decisions are rendered in English, and only 10 per cent in French. These figures do not include one board which replied, "Due to the complexity of the cases heard, the number of exhibits submitted which have to be verified by expert officers of the Board, decisions are rarely delivered from the Bench; when so delivered, they are delivered in the language used during the course of the hearing." In replying to Questions 12 and 13 this board stated that approximately 85 per cent of the cases it heard were in English and the remaining 15 per cent in French. If we took these to be representative figures and added them to the figures already tabulated, the percentage of decisions in English would be decreased slightly and that in French increased.

In reply to the next question, 12 boards stated that decisions are always published in the language in which they are rendered, and one stated that this is almost always the case. When queried about the translation of decisions into the other language, six boards out of eight replying stated that French decisions are always translated into English for publication, and two that they were not. With respect to English-language decisions, nine boards stated that they are translated into French for publication and four that they are not.

Table VI.3. Language of decisions given by federal boards and commissions, by percentages

Board or commission	Language of decision	
	English	French
Air Transport B.	100	—
B. of Broadcast Governors	50	50
B. of Transport Commissioners	—	—
Canada Labour Relations B.*	90	10
Canadian Pension C.	91	9
Merchant Seamen Compensation B.	100	—
National Energy B.	98	2
National Parole B.	75	25
Restrictive Trade Practices C.	95	5
Tariff B.	95	5
Tax Appeal B.	92	8
Unemployment Insurance C.	100	—
War Veterans Allowance B.	94	6
Average	90	10

* The board stated, "Decisions are drafted in English and are translated and issued to the parties in French when this language is used by them."

We tried to determine whether there had been an increase in cases heard in French during the last three years. Nine boards stated that they had not noticed any increase, and two estimated the increase at about 5 per cent. One board, however, estimated the increase at 50 per cent.

Section 2(g) of the Canadian Bill of Rights enacts that no federal law shall be construed or applied so as to "deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved, or in which he is a party or a witness, before a . . . commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted."¹¹ The replies to our question concerning the use of interpreters by federal quasi-judicial boards and commissions were not entirely satisfactory. Only six boards replied fully. Of these, five estimated that they used interpreters in anywhere from .01 per cent to 5 per cent of the time. The Board of Broadcast Governors stated that it employed a simultaneous translation system at all its hearings and had found it highly satisfactory after an awkward initial period. One board estimated it used interpreters from English to French in 2 per cent of its cases, and from French to English in 10 per cent of its cases. We have already drawn attention to the lack of qualifications of many interpreters who operate in Canadian courts and boards or commissions and particularly to the case of *Nishi v. M.N.R.*¹² involving the Tax Appeal Board. Since a prerequisite for conducting hearings in both languages is the availability of stenographers competent in each language, a specific question was directed to this problem. Most boards indicated that they either had bilingual stenographers or had access to independent stenographic services when the need arose.

6.09. As we have noted, section 133 of the B.N.A. Act, which allows the use of both languages in federal courts, does not apply to quasi-judicial boards and commissions. Nevertheless, we have also seen that a measure of bilingualism exists *de facto*. Since none of the statutes or regulations governing these boards refers to linguistic usage, we inquired, by means of a second questionnaire, whether the practice of allowing the use of two languages was based on custom. Of the 12 boards and commissions queried, all of them stated that 1) their governing statutes did not contain any provision regulating the languages in hearings or submissions; 2) they had no regulations governing the use of languages in hearings or submissions; 3) they had not themselves issued any rules, regulations or directives governing the use of languages in hearings or submissions; and 4) the use of two languages in hearings before, or submissions to them was governed by unwritten custom. In other words, the *de facto* application by federal boards and commissions of the principle recognized by section 133 of the B.N.A. Act is based on custom or past practice, and from the comments accompanying the replies it would appear to depend on practical considerations only. All the replies indicated that French could be used at the option of the parties and that in such event stenographic facilities would be provided. Some boards also provide translating services (except the Board of Broadcast Governors which has simultaneous interpretation). One board stated that "the language which would prove the most expeditious to the parties involved in the appeal is the one used by the Board." Only one respondent said that its recognition of bilingualism was based "indirectly" on section 133 of the B.N.A. Act.

6.10. A number of comments made by the respondents to the first questionnaire are worth noting. The success experienced by the Board of Broadcast Governors with simultaneous interpretation has already been referred to and deserves further study with a view to spreading it to other quasi-judicial tribunals and perhaps to ordinary courts of law. One board stated that it was its policy to translate those of its decisions which might affect citizens in French-speaking parts of Canada, and in particular in Quebec. It added: "Where an application originates, for example, in the Province of Quebec, reporting and translating arrangements are made for the hearing so that evidence may be given in either language. However, many French-speaking witnesses, testifying on technical matters, are bilingual and choose to express themselves in English so as to avoid any possible distortion of their evidence arising from translation from French into English."

Another does not conduct hearings, but makes its decisions on the basis of the written records prepared for its consideration in various parts of the country. It stated that language was not a serious problem, since all members of the Board speak, read, and write English fluently and the English-speaking members "can read French." It added, "The submissions are usually prepared in English by a bi-lingual officer, although the information in the file may be in the French language."

Other comments were the following:

Nearly all the Board's work is carried on in English.

In an inquiry on a Reference parties are heard in the language of their choice; French is very rarely used.

In appeals the appellant is occasionally heard in French if he so chooses. The respondent . . . is merely told of the language that the appellant is going to use. No interpreters are employed.

The Board generally sits in panels of three; where the proceedings are to be wholly or in part in French the panels are constituted accordingly.

The . . . Commission has been in existence since 1952. Where witnesses are to be examined in the course of investigation they are subpoenaed before a member of the Commission, who acts as presiding officer for the examination. Where it appears that a witness prefers to testify in French the examination is presided over by the French speaking member and the record is taken in French. These examinations usually take place in the Montreal area.

In only one inquiry has the evidence been predominantly in French. In that case, in September 1962, the Statement of Evidence (which is a summary of the case . . .) was submitted to the Commission in French and for the convenience of counsel for the parties translated into English. At the hearing before the full Commission argument was heard in both English and French. The report of the Commission in this case was written in French in the first instance.

In one other case, although all evidence and argument was in English the report was also in the first instance written in French. All reports are presented to the Minister of Justice in both languages and are published at the same time in both languages.

In a recent inquiry conducted in English a witness wished to testify before the Commission in French. The counsel who called him was unable to question him in French and at counsel's request an interpreter was provided.

The language practices of the Board are constant in all cases. Parties appearing before the Board use the language of their choice and translators are made available to assist the parties and those members of the Board who are not bilingual.

E. Conclusions

6.11. Our conclusions can be summarized as follows. There is no constitutional or legislative provision requiring federal administrative boards or commissions to be bilingual, and when they are so, it is by custom. Of the personnel of the boards and commissions surveyed, 78.5 per cent are English-speaking and very few of them bilingual, 21.5 per cent are French-speaking and all of them are fluently bilingual. The great majority—93 per cent—of cases are conducted in English; 6.9 per cent are conducted in French. Cases are always, or almost always, conducted in the language of written proceedings submitted to the boards, and 91.9 per cent of all written proceedings are in English. Of the decisions rendered by federal administrative boards 90 per cent are in English, although they are then frequently translated into French as the need arises. All boards and commissions claimed to be willing to provide bilingual stenographic and/or translation services when required to enable parties to use their mother tongue. One commission even indicated that it sometimes held hearings in Greek, Italian, Spanish, or German.

7.01. In order to provide a foil against which to judge the conduct of quasi-judicial proceedings before federal boards and commissions, we decided to examine the operations of Quebec boards and commissions that carry out quasi-judicial functions. These administrative entities were the same 12 whose subordinate legislation we discussed in Chapter III: Montreal Expropriation Bureau, Workmen's Compensation Board, Quebec Social Allowance Commission, Minimum Wage Commission, Quebec Hydro Electric Commission (Hydro-Québec), Quebec Municipal Commission, Electricity and Gas Board, Water Board, Quebec Agricultural Marketing Board, Transportation Board, Highway Victims Indemnity Fund, and Public Service Board.

This research was conducted basically by means of a detailed questionnaire, similar to that answered by federal boards and commissions.¹ Although the Quebec Hydro Electric Commission replied at length to our questionnaire, we have omitted it from computations in this chapter because it does not perform any adjudication and consequently does not qualify as a quasi-judicial entity. Regrettably, the Liquor Board, the Rental Board, the Labour Relations Board, and the Securities Commission, all of them highly active quasi-judicial boards, did not reply to the questionnaire. This is very unfortunate since the Rental Board and the Labour Relations Board in particular are very active and operate in a manner analogous to that of courts of law and their replies would have been very useful and rendered our statistics more accurate.

A. From the Constitutional Point of View

7.02. In the previous chapter we examined the constitutional position of federal quasi-judicial boards and commissions and noted that there are no serious jurisdictional problems at the federal level. The situation is not as clear for provincial boards and commissions exercising quasi-judicial powers. While section 92(14) of the British North America Act entrusts to the provinces exclusive jurisdiction over the administration of

justice in the province "including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts," section 96 of the Act provides that the federal cabinet shall appoint "the Judges of the Superior, District, and County Courts in each Province." Section 98 further provides that "Judges of the Courts of Quebec shall be selected from the Bar of that Province." From a constitutional point of view the attribution of quasi-judicial functions to provincial boards and commissions can create two problems. The first one results from section 96 of the Act. Indeed, if the board or commission has received powers which are equivalent to those of "Superior, District, and County Courts," the question arises whether its members need not be appointed by the federal cabinet. The creation of the tribunal itself is obviously within provincial jurisdiction under section 92(14). Both the Privy Council and the Supreme Court have been called upon to resolve this problem.²

The leading case is that of *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*³ In this judgement, rendered by Lord Simonds of the Privy Council, the court had to deal with the issue of whether the Saskatchewan Labour Relations Board constituted a court within the meaning of section 96 of the B.N.A. Act. Lord Simonds wrote:

The borderland in which judicial and administrative functions overlap is a wide one and the boundary is the more difficult to define in the case of a body such as the appellant Board, the greater part of whose functions are beyond doubt in the administrative sphere. Nor can a more difficult question be posed (but their Lordships can find no easier test) than to ask whether one Court is "analogous" to another.

The question for determination has been stated as a double one. And so logically it is. For it should first be asked whether the appellant Board when it makes an order under s. 5(e) of the Act is exercising judicial power. If it is not, then it is not a Court at all and cannot be a "Superior, District or County Court" or a Court analogous thereto.

...there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also.

... It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the Court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings. Here at once a striking departure from the traditional conception of a Court may be seen in the functions of the appellant Board. For, as the Act contemplates and the Rules made under it prescribe, any trade union, any employer, any employers' association or any other person directly concerned may apply to the Board for an order to be made (a) requiring any person to refrain from a violation of the Act or from engaging in an unfair labour practice, (b) requiring an employer to reinstate an employee discharged contrary to the provisions of the Act and to pay such employee the monetary loss suffered by reason of such discharge, (c) requiring an employer to disestablish a company-dominated organization or (d) requiring two or more of the said things to be done.

Other Rules provide for the discharge by the Board of other functions. It is sufficient to refer only to (b) *supra*, which clearly illustrates that, while the order relates solely to the relief to be given to an individual, yet the controversy may be raised by others without his assent, and, it may be, against his will, for the solution of some far-reaching industrial conflict. It may be possible to describe an issue thus raised as a *lis* and to regard its determination as the exercise of judicial power. But it appears to their Lordships that such an issue is indeed remote from those which at the time of Confederation occupied the Superior or District or County Courts of Upper Canada.

... It is in the light of this new conception of industrial relations that the question to be determined by the Board must be viewed, and, even if the issue so raised can be regarded as a justifiable one, it finds no analogy in those issues which were familiar to the Courts in 1867.

This matter may be tested in another way. If the appellant Board is a Court analogous to the Superior and other Courts mentioned in s. 96 of the B.N.A. Act, its members must not only be appointed by the Governor-General but must be chosen from the Bar of Saskatchewan. It is legitimate therefore to ask whether, if trade unions had in 1867 been recognized by the law, if collective bargaining had then been the accepted postulate of industrial peace, if, in a word, the economic and social outlook had been the same in 1867 as it became in 1944, it would not have been expedient to establish just such a specialized tribunal as is provided by s. 4 of the Act. It is as good a test as another of "analogy" to ask whether the subject-matter of the assumed justiciable issue makes it desirable that the Judges should have the same qualifications as those which distinguish Lordships that to this question only one answer can be given. For wide experience has shown that, though an independent President of the tribunal may in certain cases be advisable, it is essential that its other members should bring an experience and knowledge acquired extra-judicially to the solution of their problems. The members of the Board are to be equally representative of organized employees and employers and in a certain event of the general public. That does not mean that bias or interest will lead them to act otherwise than judicially, so far as that word connotes a standard of conduct, but it assuredly means that the subject-matter is such as profoundly to distinguish such a tribunal from the Courts mentioned in s. 96.

In 1958 the Canadian Supreme Court considered the matter in the case of *A.F. Dupont v. Inglis*.⁴ The judgement of the court was delivered by Mr. Justice Rand. We quote the following relevant passage from it:

The Province, under its authority over the administration of justice, including the establishment of Courts, may and is in duty bound to maintain judicial tribunals and define their jurisdiction. The restriction of s. 96, with ss. 99 and 100, provisions vital to the judicature of Canada, is confined to Courts endowed with jurisdiction conforming broadly to the type of that exercised in 1867 by the Courts mentioned in the section or tribunals analogous to them. A distinction is here necessary between the character of a tribunal and the type of judicial power, if any, exercised by it. If in essence an administrative organ is created... there may be a question whether Provincial legislation has purported to confer upon it judicial power belonging exclusively to Courts within s. 96. Judicial power not of that type, such as that exercised by inferior Courts, can be conferred on a Provincial tribunal whatever its primary character; and where the administrative is intermixed with *ultra vires* judicial power, the further question arises of severability between what is valid and what invalid.⁵

On the whole, the power of provincial governments to create quasi-judicial boards and commissions has been upheld subject to compliance with the above-mentioned restrictions outlined by the Privy Council and the Supreme Court.⁶

The second constitutional problem relates to section 133 of the act. If quasi-judicial boards and commissions in Quebec are "courts" then this section applies to them and they are bilingual. Both languages can be used before them. Otherwise nothing stops the province from decreeing that only French must be used in proceedings before such boards and commissions. As stated in Chapter VI we are of the opinion that administrative boards and commissions were not contemplated by the Fathers of Confederation and that section 133 does not apply to them. Boards and commissions in Quebec are not bound to adhere to section 133.

B. Linguistic Qualifications of Board Members

7.03. Of the total of 153 members of the 11 boards and commissions surveyed and replying, 144 (or 94.1 per cent) were French-speaking and only nine English-speaking. Almost all the members of Quebec boards and commissions were said to write and speak English either "very well" or "quite well." They divided equally between these two categories. Less than .2 per cent were listed as speaking or writing English "with difficulty." This almost complete bilingualism is in marked contrast with proportions of no more than about 10 per cent of bilingual English-speaking members on federal boards or commissions.⁷ Although we have no statistics on the knowledge of French of the very few English-speaking members of these boards and commissions, we can assume that it ranges from very good to quite good if the personal observations of most practising lawyers can be trusted.

We asked our respondents to state how many of their employees *spoke* either one official language or both. One commission did not provide specific figures, but declared that all its employees spoke French and that 90 per cent of them also spoke English. While the replies disclosed that the majority of employees spoke both languages, we have some reservations about the accuracy of the replies. For instance, one board stated that 333 of its employees spoke English and that the same number spoke both languages. We do not know whether the answer means that 333 employees are bilingual and that all of these are English-speaking or that out of a total of 1,112 employees 333 are bilingual. The same might be said about the replies of one or two other boards. We erred in not phrasing the questions narrowly enough to avoid any possible misinterpretation.

C. Proceedings before Quebec Boards

7.04. An average of 86.5 per cent of all *written* proceedings before the 10 boards replying are in French and the remaining 13.5 per cent in English. The percentages are almost the same for *oral* presentations: 83.8 per cent in French and 16.1 per cent in English (see Table VII.1).

Table VII.1. Language of proceedings before Quebec boards and commissions, by percentages

Board or commission	Language of written proceedings		Language of oral presentations	
	French	English	French	English
Montreal Expropriation B.	80	20	80	20
Workmen's Compensation B.	95	5	95	5
Social Allowance C.	100	—	—	—
Minimum Wage C.	90	10	85	15
Municipal C.	90	10	90	10
Electricity and Gas B.	90	10	75	25
Water B.	90	10	90	10
Agricultural Marketing B.	75	25	75	25
Transportation B.	75	25	75	25
Highway Victims Indemnity Fund	*	*	*	*
Public Service B. †	80	20	90	10
Average	86.5	13.5	83.8	16.1

* Not applicable.
† Rule of Practice No. 4 adopted on February 28, 1956 by the Public Service Board pursuant to the Public Service Act (R.S.Q. 1964, c.229) states: "Every application made to the Board shall be in writing, in quadruplicate, preferably in the form of a petition, which shall be printed, typed or legibly written in ink, in *French or English*, and on one side of the paper only."

In regard to language used by board members, out of 10 boards replying, five stated that French was the language always used by their members in the course of hearings. The other five said that French was used "often." As for English, two boards said that their members used it "often," and eight that they did so "rarely."

Three boards said that witnesses always used French and seven that they did so "often." As for English, three boards replied that witnesses resorted to it "often," and seven that they did so "rarely."

Ten out of 11 boards replying stated that they did not retain the services of interpreters and another one alluded to the occasional use of volunteer interpreters. Only two out of 11 boards said that sometimes lawyers retain the services of interpreters. The Bill of Rights' requirement of interpreters before boards and commissions does not apply to provincial tribunals.⁸

The replies to our queries about the availability of stenographers able to take down depositions in French, English, or both were not too clear. Out of nine boards, three stated that they had no stenographers. One board declared that the parties requiring stenography would bring with them official stenographers from the Superior Court. One commission said that it did not have stenographers and would hire official court stenographers as the need arose. Only five boards stated that they had their own stenographers

to record evidence, all but one of them having a certain number of stenographers capable of taking down evidence in English or in both languages.

7.05. Of all the decisions rendered by the 10 boards replying, 86.5 per cent are in French (*see* Table VII.2). This proportion reflects that of written and oral proceedings. When asked to state the reasons for their linguistic practices five boards out of the 10 replying referred to the mother tongue of their members, but four claimed that this was *not* the explanation. Eight boards declared that their usual criterion was the language of those at whom the decision was aimed. One board, however, stated that it paid no attention to this factor. Another said, "within the administration everything is done in French," and added, "Every decision is made in French but is translated if the party to whom it applies is English-speaking."⁹

Table VII.2. Language of decisions given by Quebec boards and commissions, by percentages

Board or commission	French only	English only
Montreal Expropriation B.	100	—
Workmen's Compensation B.	95	5
Social Allowance C.	100	—
Minimum Wage C.	100	—
Municipal C.	90	10
Electricity and Gas B.	100	—
Water B.	90	10
Agricultural Marketing B.*	20	—
Transportation B.	75	25
Highway Victims Indemnity Fund	†	†
Public Service B.	95	5
Average	86.5	11

* The Agricultural Marketing Board stated that 80 per cent of its decisions were rendered in both languages and 20 per cent in French only.

† Not applicable.

Other comments were the following:

The French version is well received, even by attorneys who are English-speaking.

Many proceedings are instituted before the board simultaneously in French and English versions. This gives complete freedom to the board to deal exclusively in French if it so wishes.

In the majority of cases, the hearings are in French as most of the parties heard are French-speaking.

If the decision concerns a predominantly English group, the decision is taken in that language.

A simple matter of politeness—recognizing the status of the two official languages—our organization goes to a lot of trouble in this regard.

Certain members of the board claim that it is easier for them to render a decision in their mother tongue.

Certain other members claim that it is more normal to render the decision in the language of the person to whom it applies.¹⁰

7.06. As a rule none of the decisions of the boards replying are published in any formal or organized manner, although the more important decisions of the Labour Relations Board (which did not reply to our questionnaire) are reprinted in *La Revue du Droit du Travail* and in other unofficial legal periodicals. The Service de Recherche et d'Information of the Quebec Department of Labour issues a loose-leaf service called *Décisions sur des conflits de droit dans les relations de travail* which also contains many decisions of the Labour Relations Board.

7.07. Some boards and commissions made general comments worth noting. One respondent stated that the difficulties of interpretation it had encountered were the same as those of ordinary courts. Another wrote about the use of French: "Although French predominates, the language spoken does not seem to provoke any recriminations. The English-speaking participant feels at ease in using his language or in pleading in English if he feels that he will be better understood—and he makes free use of this right. French is not imposed." The English language, it is said, is "always well received. Rare are the cases when it must be resorted to exclusively. But the exigencies are respected."¹¹ Another commented, "French being more precise, it is sometimes difficult to find an exact translation." About English, it stated, that "certain problems of translation are posed when one board makes an award by arbitration. But it is not an insurmountable problem."¹²

D. Conclusion

7.08. While a large majority of cases heard by quasi-judicial boards and commissions in Quebec are conducted in French, this practice obviously results from the choice of the parties rather than from any built-in deficiencies of the system. Indeed, practically all members of these boards and commissions are fluently bilingual and adequate bilingual stenography seems to exist. The percentage of cases proceeding in English (16.1) in Quebec is more than double that (7.3) of cases conducted in French before federal boards. Bilingualism is not so exceptional before Quebec quasi-judicial tribunals.

A. Introduction

8.01. The purpose of the present chapter is to examine from a juridical point of view the operations of bilingual municipalities. At the present time municipal institutions are officially bilingual only in Quebec. A certain degree of *de facto* bilingualism also prevails in some areas of New Brunswick and perhaps elsewhere in Canada. In order to determine how bilingual municipalities operate, we have concentrated our study on Quebec, although we made a more limited survey of the New Brunswick experience.

1. Methods of research

Our research was conducted mainly through a questionnaire¹ which was sent to a total of 34 Quebec and eight New Brunswick municipalities. We received 21 usable replies; 17 from Quebec and five from New Brunswick. In addition, while we did not send a questionnaire to the city of Montreal, we examined carefully its 1180-article charter² and its more than 3,000 by-laws up to November 31, 1965. Montreal is a completely bilingual metropolis which is not entirely typical of bilingual municipalities in Quebec.³ It has a numerous and powerful English-speaking minority and has traditionally conducted most of its public affairs in both languages. The distribution of the English minority in the 17 Quebec municipalities replying to our questionnaire was smaller and did not appear to have the same social importance as in the metropolis. This will be evident from Table VIII.1. The sampling of municipalities replying is fairly representative of the total of 34 Quebec municipalities queried, as will appear from Table VIII.2 which indicates the percentage of the English minority in the municipalities which *failed* to reply to the questionnaire.

Table VIII.1. Anglophones in Quebec municipalities replying to our questionnaire

Anglophones (%)	Number of municipalities
0-10	11
10-20	4
20 or over	2*

* One of them is the city of St. Lambert which, according to the 1961 census, had, out of a total of 14,531 citizens, 5,929 who spoke only English, 2,210 who spoke only French, and 6,324 who were bilingual. This gave it the highest ratio of English inhabitants among our Quebec respondents. If mother tongue is the criterion, English was the mother tongue of 7,970 citizens of the city of St. Lambert, the absolute majority.

Table VIII.2. Anglophones in Quebec municipalities not replying to our questionnaire

Anglophones (%)	Number of municipalities
0-10	10
10-20	3
20-30	3
30-40	1

In New Brunswick the samplings could not be as accurate and could not provide statistical data of any importance. In the five municipalities of that province which replied, the French-speaking population varied from 2 per cent to 85 per cent (see Table VIII.3).

Table VIII.3. Francophones in New Brunswick municipalities replying to our questionnaire

Francophones (%)	Municipality
85.0	Edmundston*
7.7	Fredericton
36.2	Moncton
2.0	Oromocto
14.4	Saint John

* According to the 1961 census, in Edmundston, out of 12,791 citizens, 796 spoke English only, 5,947 French only, and 6,023 claimed to be bilingual. If the mother tongue is to be taken as a criterion, French was that of 11,354 inhabitants and English that of only 1,344.

Table VIII.4. Francophones in New Brunswick municipalities not replying to our questionnaire

Francophones (%)	Municipality
8.5	Lancaster
63.3	Bathurst
5.4	Simonds

The variations were just as considerable in the three municipalities from which no reply was received (*see* Table VIII.4). Obviously, a much larger number of New Brunswick cities and towns should have been included in our survey to provide really meaningful comparisons.

2. *Historical background*

8.02. Official bilingualism in municipal institutions has been limited historically to Quebec or to Lower Canada. While not purporting to have made an exhaustive historical survey, we draw attention to the following provision in the statutes of Lower Canada just prior to Confederation to establish the historical roots of the present rules of law. In 1845 the Legislative Assembly of Lower Canada adopted a statute dealing with police powers in Quebec, Montreal, and Trois-Rivières.⁴ This act permitted the justices of the peace in these three municipalities to frame rules and orders, with fines and penalties for the breach thereof, “judged requisite and proper for the regulation of the police” in these cities. Section II provided that no such rule or order could have effect before a copy thereof “in French and English” had been fixed and posted on the door of the parish church in these cities and in such public places “and published in such newspapers printed in the said cities, respectively, as the said justices of the peace shall order.”

A number of important provisions are found in an Act respecting Municipalities and Roads in Lower Canada.⁵ Section 6(2) stated that all public notices required by the Act would be given in the following manner: “The person required to give such notice shall cause the same to be drawn up, and shall give it, in the English and French languages, unless the use of either of the said languages be dispensed with in the manner hereinafter provided, and then in that one of the said languages which should be used; . . .” Section 7(2) required that special notices be given in the language of the person to whom they were addressed: “The person required to give such notice shall cause it to be drawn up in the language of the person to whom it is addressed, if such language be the English or the French, or if it be any other language, then, in either the English or the French language, and after having signed it, shall serve it on the person to whom it is addressed, by causing a true copy thereof to be delivered to him personally, or left with some grown person at his domicile; . . .” This distinction between public and special notices is preserved in the current Cities and Towns Act⁶ in Quebec, although the reference to the language of the receiver of the special notice has been eliminated.

Provision was also made in the 1861 act for bilingual publication of by-laws:
Every municipal council shall publish each by-law made by it, by causing to be posted in the manner hereinbefore prescribed within fifteen days from the passing

of such by-law a public notice certified by the Secretary-Treasurer, mentioning the date and object of such By-law, and the place where communication thereof may be had;

2. In parishes, the council shall also publish all by-laws, by causing them to be read in the English and French languages, unless the use of either of the said languages be dispensed with, and then in that one of the said languages which should be used, at the door of the church of the parish to which they relate, immediately after divine service in the forenoon, if such service be celebrated, on each of the two Sundays next after the passing of such by-laws;

3. And every such council may also cause all, or any, of such by-laws to be published in any newspaper printed in the district, or in any adjoining district.

However, the government could dispense any municipality by Order-in-Council from publishing its by-laws and public notices in both languages provided this could be done "without detriment to any of the inhabitants thereof."⁷ This dispensation is still found in the Quebec Municipal Code governing less important municipalities. It does not appear in the Cities and Towns Act.

Exceptions were soon made to the requirements of bilingualism. For instance, the 1863 statute incorporating the town of Joliette⁸ required that by-laws be published only in French while the statute incorporating the town of Beauharnois in the same year⁹ stated that public notice of municipal elections need be in French only. In Montreal, on the other hand,¹⁰ as in Quebec City,¹¹ the law continued to require publication of notices in both languages. The statute incorporating Berthier in 1865 provided for bilingual notices of sale of immovables.¹² Provision for bilingual notices was again made in the 1866 Act to provide for ascertaining what persons have rights in the Commons of Berthier and Île du Pads.¹³ In the same year an amendment to the statutes governing the city of Montreal stipulated that the expropriation commissioners were to give bilingual notices of the day on which the value of land to be expropriated would be determined.¹⁴

3. *Legal background*

8.03. Under Section 92(8) of the British North America Act, exclusive jurisdiction over "Municipal Institutions in the Province" is attributed to the provincial legislatures. New Brunswick, in which English is the official language, does not appear to have legislated on the use of languages by municipalities. Quebec, on the other hand, has done so: section 362 of the Cities and Towns Act provides that all public municipal notices "must be drawn up in French and in English." This provision does not apply to special notices which must be served only on the interested parties.¹⁵ Section 382 of the Act states, "Except where otherwise provided, documents, orders or proceedings of a council, the publication of which is required by law or by the council, shall be published in the manner and at the place prescribed for public notices." Since sections 387, 391, and 392 provide for publication of the by-laws of cities and towns in Quebec, by reference to section 382, which in turn refers to section 362, all municipal by-laws must be in *both* languages. Publication of a by-law in one language only is illegal. As a rule, under section 2 of the Act, its provisions apply to all the more important cities and towns that have been incorporated by special act of the legislature or by letters patent. It should be noted

that section 358 of the Cities and Towns Act permits the city council to make and enforce rules and regulations for its internal government.

No reference is made to the language of deliberations. Consequently, subject to the foregoing provisions, a city council could legally decide that all its deliberations should be conducted in a single language, provided that by-laws and decisions were rendered in both languages. Less important towns and territories in the province are governed by the Municipal Code. Article 127 of the Code guarantees the right to use either French or English in any sittings of the municipal council. Article 128 states that all municipal records must be kept in either French or English but does not require that they be kept in both languages. Public notices, by-laws, resolutions, and orders must be published in both languages¹⁶ unless the corporation has been authorized to use only one language by Order-in-Council.¹⁷ Without such exemptions by Order-in-Council, the publication of a by-law in only one language will render it illegal.¹⁸ None of the municipalities replying to our questionnaire had been so authorized by the minister of Municipal Affairs.

As we shall see, many Quebec municipalities do not meet the legal requirement that their by-laws be bilingual. That this is not a new phenomenon is evident from the Act to validate the Publication of certain Municipal Notices,¹⁹ which was designed to enable municipalities to correct this illegality at least for the period prior to April 11, 1935. This statute read as follows:

The publication of any special or public notice, by-law, resolution or ordinance of a municipal council, made before the 11th of April, 1935, either in the French language or in the English language, when the law required that such publication be made in both languages, may be declared valid and legal by following the formalities hereinafter prescribed.

The municipal council may, by resolution, make a petition therefor to the Lieutenant-Governor in Council and the latter, upon a report of the Quebec Municipal Commission to the effect that acquired rights are not affected, may grant the petition of the said municipal council.

The order of the Lieutenant-Governor in Council granting such petition shall have the effect of rendering the publication concerned valid and legal for all legal purposes.

It was never amended or repealed but, having obviously fallen into desuetude, it does not appear in the 1964 Revised Statutes of Quebec.

Limitations of time prevented us from examining individually the hundreds of letters patent and private bills dealing with various municipalities in Quebec and in which relevant provisions or exceptions to the general law might be found. They might contain legislative exemptions from bilingual publication of by-laws for smaller municipalities consisting entirely of Francophones. We can only hope that subsequent research will complete the investigation we initiated. Question 2 of our questionnaire was specifically aimed at uncovering whether such special provisions might be found in the incorporating charters or statutes.

None of the Quebec municipalities had provisions which rendered one or the other language obligatory. Three stated that both languages were obligatory, and five that both were permissible. None of the New Brunswick municipalities had relevant provisions, but the city of Moncton indicated that the use of either French or English was "optional."

B. Municipal By-laws

8.04. We saw that in Quebec, unless there is an exemption for a municipality governed by the Municipal Code, or provisions to the contrary in the incorporating charter or letters patent, all municipal by-laws must be published in both languages. The results of our questionnaire are puzzling in view of the fact that none of the municipalities queried claimed an exemption from bilingual publication.

1. Language used in drafting by-laws

Sixteen out of 17 Quebec municipalities always drafted all their by-laws in French. The city of St. Lambert, on the south shore of the St. Lawrence, across from Montreal, 60 per cent of whose citizens are English-speaking, was the only one to claim that it drafted its by-laws in both languages. When asked for the reasons for their practice, eight municipalities stated that it was because of the overwhelming French-speaking majority in their community. Two municipalities said that they had no demand for English drafts. One explained that only French was used because it was the language of the attorneys drafting the by-laws. One blamed the fact that some members of the city council did not know English. Another one stated that all its personnel were French-speaking. Two said that all or almost all members of the council were French-speaking. Three commented that an English version would be prepared upon request and forwarded.²⁰ In New Brunswick, all the municipalities replying stated that their by-laws were drafted in English only. The reasons given varied from the fact that all relevant provincial statutes were in English, to custom, lack of demand, or the fact that English "is the only language everyone understands."

For the reasons already indicated, we noted with considerable surprise that only eight Quebec municipalities indicated that their by-laws were published in both languages while nine said that French was the only language used. Since none of these nine municipalities was exempted from bilingual publication, their by-laws must be illegal. In Montreal by-laws 1 to 1706 were published separately in French and English versions. Since August 18, 1942 (by-law 1707), both versions are published simultaneously and on the same page (the French on the left- and the English on the right-hand side). When older by-laws are either consolidated or reprinted, they are issued with both versions on the same page. The charter of the city of Montreal does not contain any rule except for its requirement that annexation by-laws be published once a week for one month in two English and two French newspapers in the city.²¹

All New Brunswick municipalities replying to our questionnaire stated that they published their by-laws only in English.

The replies to our question about the translation of by-laws were not very helpful. As we have seen, nine out of 16 Quebec municipalities replying did not bother to publish their by-laws in two languages. We also saw that some of the municipalities which drafted their by-laws only in French would provide translations on request. In reply to our specific question, three Quebec municipalities stated that if any translation took place, it would be from French into English. (Ten municipalities said that no such translation took

place.) Only one municipality had had occasion to translate its by-laws from English into French. None of the New Brunswick municipalities did any translation.

2. *Conflicts between English and French versions*

In Part 3 we examined the problems resulting from legislating in two languages, and particularly the problems of interpretation it creates.²² In this respect, there is no fundamental distinction between statutory legislation, subordinate legislation, and municipal legislation according to by-law. Under all three, rules are promulgated to govern specified acts or omissions. The activities regulated may differ, but generally speaking the legislative process is the same. Not as much care may be given to consistency and linguistic niceties at the municipal level as in the drafting of acts of Parliament, but the problems of drafting a municipal by-law in two languages are not much different from those facing the federal or provincial legislators.

Since much municipal legislation is very technical, one problem encountered is that of terminology. One language might not have the exact equivalent of a well-known term in the other language. As with subordinate legislation²³ clarity is frequently achieved by giving between brackets the English, or French, equivalent of the term of which a translation is attempted. We have noted the following examples in the by-laws of the city of Montreal: "cabrouets (Scotch carts),"²⁴ "panneau à rabattement (tail-board),"²⁵ "jeux de boules (pinball machines),"²⁶ "fuel burning equipment (appareil de combustion),"²⁷ "dust-separating equipment (appareil de dépoussiérage),"²⁸ "alarm (alarme),"²⁹ and "building (bâtiment)." ³⁰

The second most difficult problem is that of interpreting conflicts between the French and English versions of the same by-law. Question 16 of our questionnaire asked whether municipal by-laws contained any rules giving priority to either text in case of divergencies between French and English versions of a by-law. Six municipalities in Quebec stated that the French text would prevail, and four that it would not. None stated that the English version would prevail, except the city of Arvida which said that the English version had priority from 1926 to 1948 inclusive. Both the cities of St. Lambert and of Salaberry de Valleyfield stated that their rule of interpretation was to give priority to the text which is most consistent with the intention of the by-law. The city of Val d'Or said that its by-laws were drafted in French and that consequently the original French version would have priority. Since, as we have seen, the majority of Quebec municipalities queried had official versions of their by-laws only in French, any English translation would be unofficial and could not really prevail against French texts approved by the city council. No replies were received from New Brunswick.

Our survey of by-laws of the city of Montreal disclosed that at least 11 by-laws contained a specific provision as to which text would prevail. In 10 cases it was provided that in the event of conflict or contradiction between the English and French versions, the French texts would prevail.³¹ Only one by-law provided that the French or English text would prevail according to circumstances.³²

An interesting problem of interpretation results from municipal legislation by reference. By-law 891 concerning milk³³ contains a reference to the norms of the Interna-

tional Association of Milk and Food Sanitarians, the United States Public Health Service, and the dairy industry. Upon our inquiry, the International Association of Milk and Food Sanitarians advised us in writing on August 14, 1965 that it had no French version of its sanitary norms. Nevertheless article 164 of this by-law states that the French text shall prevail in the event of conflict. The prevalence of French is somewhat negated by the reference to the norms of an American association. The same situation is found in by-law 2395 concerning plumbing. Article 18-6 thereof refers to the making of fuel-oil tanks with materials meeting the specifications of the National Fire Codes of the National Fire Protection Association of the United States. We can presume that this association also issues all its specifications in English only. Nevertheless article 0-6 of the by-law gives priority to French.

C. Municipal Councils

8.05. Sixteen Quebec municipalities out of 17 said that the language usually spoken during council meetings was French. The seventeenth, the city of St. Lambert, had bilingual meetings. The minutes of 16 were in French, only those of St. Lambert being in two languages. Section 128 of the charter of the city of Montreal provides: "The minutes of the meetings of the council shall be drawn up and fairly entered or typewritten in French and English, in a book kept for that purpose by the city clerk; after being read and confirmed at the following meeting, they shall be signed by the clerk and by the mayor or the councillor who presides at such meeting; they shall be open to the inspection of all rate-payers who wish to examine them." The charter does not contain any provision concerning the language to be used in the Executive Council,³⁴ but we are advised that the minutes of the Executive Council are kept in French only.

8.06. No municipality replying to our questionnaire had a service of interpreters. With respect to council meetings, 15 Quebec municipalities said that they had no need for interpretation. The city of Val d'Or sometimes needed interpreters for translation from English to French. One city needed translation from French to English.

D. Notices, Posters, and Summonses

8.07. We saw that save for specific exceptions Quebec law requires all public notices—to be distinguished from special notices—to be drafted in both languages.

In reply to our query about the language of such notices, all 17 Quebec municipalities said that their public notices were in both languages. One stated that its special notices were only in French because they would be served only on Francophones. There thus seems to be total compliance with the law in this area, unlike that of municipal by-laws.

For the city of Montreal, section 1169 of the charter provides a similar general rule: "Whenever the city is required to give any notice in the newspapers, it shall suffice, if such notice is published once in an English and once in a French daily newspaper published in Montreal, except where special provisions prescribe a different method. The

city may also, if it wishes, publish any public or other notice in a newspaper published in a foreign language.”³⁵ The only other provisions in the charter are found in section 41 (2), which requires a bilingual public notice of amendments to the general plan of the city, and in section 573, which requires bilingual notice of the appointment of the three engineers composing the Electrical Commission of the city. On the other hand, several Montreal by-laws which stipulate the publication of public notices specify that such notices must be in both languages.³⁶

The replies from New Brunswick were interesting: two municipalities (Edmundston and Moncton) said that they occasionally published their public notices in both languages. The other three use only English.

1. Posters and similar notices

8.08. In reply to our query as to the language used for posters, notice boards, and similar notices, the replies from Quebec were as follows: five municipalities answered that their practice was to use both languages “always,” eight that they did so “generally,” one that it did so “sometimes,” and one that it never did so. One municipality said that it always used French only, two that they “generally” used French only, and two that sometimes their posters were only in French.

In New Brunswick, two municipalities (Edmundston and Moncton) said that they “usually” used both languages. The others always used only English.

8.09. In reply to our query about the language of traffic and road signs, 15 Quebec municipalities said that they used both languages. Three said that they used French only.³⁷ None used only English signs. In New Brunswick, out of four answers, the city of Edmundston said that its traffic signs were bilingual, the other three said that only English was used. The answer of the city of Moncton was not intelligible since it stated simultaneously that its signs were not in both languages, nor were they in French only, nor in English only.

2. Safety signs and labels

8.10. Many municipal by-laws provide for the posting of safety signs such as “no smoking” signs. Question 11 of the questionnaire was drafted to determine what language would be used for such signs. In Quebec 16 replies were received, of which 13 stated that such signs would be in both languages, one that they would be in either French or English, and two that they would be in French only.

A number of Montreal by-laws provide specifically for bilingual safety signs. For instance, by-law 340, section 18, relating to explosives and combustible material, states that carts containing powder must bear signs in two languages reading “Powder to be wheeled out in case of fire” and “Poudre pour être transportée en dehors en cas d’incendie.” The same by-law also requires, in section 20(e), the owner or driver of such a vehicle to post in French and English copies of the rules relating to explosives and combustibles. By-law 1275, article 20, concerning the use of fumigants, forbids that fumigation begin before the fumigator has personally inspected all the rooms and warned the responsible

occupants thereof "verbally and over his signature, in French or in English, as the case may be." By-law 2572, concerning fire prevention, provides for the following bilingual signs or notices: "sortie" and "exit";³⁸ "défense de fumer" and "no smoking"; "arrêtez le moteur durant le remplissage" and "stop motor during filling."³⁹ Similar bilingual signs dealing with smoking and stopping the engine are to be found in by-law 2600, article 14, dealing with filling stations. By-law 1319, relating to traffic and public safety, provides for "cédez" and "yield" signs.⁴⁰ Other by-laws, such as by-law 1089 concerning mattresses and other stuffed articles of bedding⁴¹ and by-law 896,⁴² concerning the meat trade, stipulate bilingual inscriptions on certain required labels.

In New Brunswick, only one municipality, namely Edmundston, which has a French-language majority of 85 per cent, would have bilingual signs. All the others required English only.

3. Traffic tickets and summonses

8.11. Sixteen out of 17 Quebec municipalities issue bilingual traffic tickets and summonses.⁴³ The only exception is Thetford Mines, which uses French only. The city of Quebec specified that 90 per cent of its summonses for violations of municipal by-laws, as distinguished from traffic tickets, were in French only, the remaining 10 per cent being in English. The city of Ste-Thérèse stated that while its traffic tickets were bilingual, its summonses were not, but it did not go further.

Traffic tickets and summonses qualify as "special notices" which are served on the recipient and are not required to be bilingual by Quebec law.⁴⁴

In New Brunswick, four municipalities said that they use only English. The city of Edmundston did not reply. Its reply might have been instructive since 85 per cent of its population is French.

E. Permits, Calls for Tenders, and Bond Issues

8.12. Our inquiry about the language in which applications for municipal business or construction permits were required to be drafted was not answered satisfactorily, perhaps due to poor drafting of the question. Eight Quebec municipalities said that permits could be requested in either language and one (the city of St. Lambert) that they had to be applied for in both languages. Only Sorel said that requests had to be in French. Granby had no language regulation.

New Brunswick law does not seem to have any provision, and all application forms for permits are printed in English.

8.13. City by-laws generally require that all requests for tenders on public works be published in newspapers. We asked our respondents to state whether their by-laws contained any language provisions. Quebec municipalities replied as follows: two said that such calls for tenders could be in either French or English, six that they had to be in both languages, and four that French was the only language provided for. One had no regulation on the subject.

Since calls for tenders are to all intents and purposes public notices, they should be in both languages, except when the municipality has been exempted from bilingual publication. There is thus some doubt as to the validity of many calls by Quebec municipalities, at least if their replies to our questionnaire are correct.

In New Brunswick, four municipalities answered that English was the language of publication, but Moncton declared that its notices were published in both French and English.

8.14. Our inquiry about the regulations dealing with the language of bond issues or debentures met with the following replies from Quebec: three municipalities stated that either language would be used and nine that both languages were required. Three municipalities had no regulations on the point.

The city of Montreal by-laws provide that all loan documents be bilingual. By-law 2369, which establishes the manner in which loans shall be made, states that debentures shall be drawn up in both French and English.⁴⁵ An exception is made, however: "If an issue of debentures is payable in lawful money of a foreign country, the debentures may be drawn up either in the French language only, or in the English language only, or at the same time in the French language or in the English language, and in the language or the languages of the country in the money of which they shall be payable and in the latter case the French language or the English language shall prevail as concerns the interpretation."⁴⁶ Article 6 of by-law 2753, creating the working capital fund of the city of Montreal, requires all treasury bills, notes, or other instruments issued on the said fund to be drawn up in both languages. Prior to by-law 2369, which now governs all loans by the city of Montreal, the specific by-laws authorizing municipal borrowing would always state that the bonds were to be bilingual.⁴⁷

In New Brunswick English was the usual language except in Edmundston which said that the choice of language was optional.

F. Language Qualifications for Municipal Employment

1. Quebec municipalities other than Montreal

8.15. Only two cities out of 16 Quebec municipalities replying to our questionnaire stated that they required their employees to know either French or English. Eleven stated that job applicants should know both French and English. Comments made in this connection are worth noting. One municipality said that a knowledge of both languages was required from "des fonctions supérieures." Another city declared that French was always a prerequisite, but that English was needed for only a few positions. A third city admitted that English was required of only those employees who might be in contact with the public. One city said that all its employees were bilingual as a matter of fact. Another one required French and "quelques notions d'anglais."

2. *The city of Montreal*

8.16. The city of Montreal, we were informed, has 417 different categories of employees. For 416 of these categories an ability to speak and write both languages is required. The one exception is the “*préposé à la planification* [superintendent of planning]” who is required only to “*posséder un minimum de connaissance de la langue seconde.*”⁴⁸

The only provision we have been able to find in the charter of the city of Montreal is section 734, dealing with the two auditors appointed by the Executive Committee to report on the municipal accounts. One of these auditors must be a French-speaking accountant and the other English-speaking. The by-laws, on the other hand, contain several pertinent positions. By-law 453, section 5, which has now fallen into disuse, required bus drivers to be able to speak both languages. Tourist guides must speak French and English “fluently.”⁴⁹ By-law 2612, concerning the Civil Service Commission, is the general by-law. Article 13 thereof states, “Every examination may be taken in English or in French, at the discretion of the candidate, except as concerns the minimum of knowledge of one of such languages or other languages.” For instance, by-law 2655, concerning the Police Department, specifically states that applicants must satisfy the requirements of by-law 2612. Taxi drivers are required to be bilingual: “A licence to drive shall only be issued to a person who is a competent driver and who is at least twenty one (21) years of age. According to this by-law a competent driver shall be the person who, in addition to the ordinary meaning given to this word, possesses a certificate from the Montreal Municipal Tourist Bureau to the effect that he is bilingual and that he has knowledge of the territory, . . .”⁵⁰

Originally two auditors were appointed to examine the books of the Montreal Transportation Commission, one French-speaking and one English-speaking,⁵¹ as is still done with the city auditors. This practice was changed in 1964, and there is no longer any language requirement.⁵² The secretary of the Transportation Commission, however, must be bilingual.⁵³ Attention should also be drawn to the old by-law 105, section 1, concerning health, which creates a Board of Health composed of 21 members, two of whom shall be practising pharmacists, one French-speaking and one English-speaking. It would thus appear that the city of Montreal not only requires a considerable measure of bilingualism from its own employees and officials, but will make a knowledge of both languages a prerequisite for municipal permits to exercise certain professions that are in constant contact with the public, such as those of tourist guides and taxi drivers.

3. *In New Brunswick*

8.17. In New Brunswick city employees are required only to speak English except in Edmundston where a knowledge of both languages seems to be required.

8.18. To the question as to whether officers and employees of the municipality were required to speak one language rather than another, we received, from Quebec, six replies that French was preferred and one that English was required first. One city replied that employees were required to speak French and preferably also English. Nine other municipi-

palities had no such requirement. In New Brunswick the only language officially required of officers and employees is English.

G. Correspondence with or by the Municipalities

1. Language of correspondence

8.19. Quebec municipalities conduct the overwhelming majority of their correspondence exclusively in French: English is used relatively little, and very few municipalities have a large measure of bilingualism. Even in these few, bilingualism seems to be confined to notices, forms, statements of account, and tax assessments. Such notices and assessments might qualify as "special notices," which as we have seen⁵⁴ need not be bilingual. Furthermore, most municipalities claim to receive correspondence in the same linguistic proportions.

In New Brunswick, except for the city of Edmundston, all correspondence sent or received by the municipalities is practically always in English. In Edmundston, however, 40 per cent of the correspondence both issued and received is in French.

2. Municipal translation offices

8.20. In reply to our queries, 14 Quebec municipalities stated that they had no need for interpreters and another two that they required interpretation only occasionally from one language to the other. We have been advised that the city of Montreal has three interpreters. In New Brunswick, interpreters are never used. No municipality replying had a special translation office to translate such documents as might require translation. When required, official documents, and particularly by-laws and public notices, were translated by a variety of municipal officers: those mentioned most often were the city clerk or the city manager, but sometimes a department head, a secretary, or some other member of the municipal administration was mentioned. In New Brunswick, the cities of Fredericton and Moncton both stated that they had bilingual personnel who could make such translations as were needed. The impression derived from the replies to our questionnaire is that, although no city appears to have a formally organized translation service, all municipalities have sufficient internal resources not to need a systematic translation system. The situation for municipalities is eased naturally by the fact that the overwhelming majority of all correspondence sent and received by municipalities appears to be in one single language.

8.21. As might have been guessed from previous answers, our respondents stated that in the overwhelming majority of cases translation is required from French to English rather than *vice versa*. Only one municipality had more translations from English to French than the reverse, and one said that the requirements were about the same for each language. In New Brunswick, one municipality required translation mainly from French to English, while another two had the reverse situation.

H. Provincial Other than Quebec

§ 12. Very little of any pertinent legislation is to be found in other provinces. Nevertheless, we wish to draw attention to some existing provisions. In Alberta the Municipal Districts Act⁵¹ provides that "No person is qualified to be elected a member of the council of a municipal district when at the date of his nomination (a) he can read and write in the English language." The Alberta City Act requires that all candidates to the municipality or the council of a city must "speak, read and write the English language."⁵²

In Manitoba the matters of the cities of Brandon⁵³ and Elm Kilbourn⁵⁴ declare that no one is eligible for election as mayor or alderman unless he is able to read or write the English language. On the other hand, the Metropolitan Winnipeg Act states that to qualify for election as member of the Metropolitan Council a candidate must be "able to read the English or French language and write it from dictation."⁵⁵

I. General Comments

§ 13. Many of the municipalities who bothered to do so made comments that were particularly significant. The city of Edmonton, however, expressed the opinion that since there were no statutes providing for linguistic usage in municipal affairs, the use of French or English was optional. As we have seen, Edmonton is bilingual to a considerable extent.

§ 14. Municipal administration is by definition local. It responds essentially to local factors. From the foregoing survey it would appear that respect of bilingualism by any given city or town is not so much dependent on the law as on the size of the linguistic minority in its ranks and on the attitudes of the city government to that minority. To us it seems proper that the degree of bilingualism vary from community to community according to circumstances. It is obviously absurd to require a municipality composed entirely of French-speaking citizens and situated in an essentially French environment to open its by-laws, draft its minutes, and publish its notices in two languages. Difficulties arise only when it comes to determining at what stage a minority becomes entitled to demand bilingualism. How many Anglophones should there be in a municipality before its by-laws have to be bilingual? Short of establishing percentages arbitrarily, the present method of always requiring bilingualism except when the municipality has been exempted may be the most flexible manner of solving the problem—in Quebec, at any rate. It enables the provincial authorities to decide on the merits of each case. Admittedly, language has not yet become an issue in municipal affairs but it could not stay a very tedious one before long. While we have studied the problem especially from the point of view of Quebec's experience, the question has national ramifications because it is impossible to expect Quebec to insist on respecting the rights of English minorities in its municipal administration if other provinces are not prepared to do the same with the sizable French-speaking minorities in some of their cities and towns. In fact, in some municipalities, such as Edmonton or New Brunswick, more than two-thirds of the inhabitants are French. The implementation of bilingualism in the municipal institutions

of other provinces may present some practical difficulties, but it appears to us that no time should be lost in giving serious examination to the possibility of official bilingualism at the municipal level in every Canadian community where the size of the linguistic minority warrants it.

At the present time there does not appear to exist any legal impediment to any municipality anywhere in Canada to make law small or linguistic minority, where there is no minority language in the conduct of its affairs, or deriving from the wishes of our governments, some municipalities in New Brunswick or in the St. Lawrence or more or less considerable extent. The same question might perhaps be found in Ontario which has a sizable concentrated French minority in the west, where bilingualism is the same conventional recognition to the linguistic rights of minorities at the municipal level, we should suggest that states should be given as a formula for or would permit, or require, municipal authorities to make possible official transactions of business and to be in the course of council meetings, in addition to the language of the majority, the language of a linguistic minority exceeding a given percentage of the population. In Quebec, it would appear that bilingualism becomes a requirement, even when the linguistic minority reaches about 20 per cent. Since many of its French-speaking citizens are bilingual, it would not present among the legal problems, especially in such provinces as might be faced in similar municipal official bilingualism. It might, then, not be unduly so for the minimum level sought. Quebec is a large enough 20 per cent, which would reflect the national proportion of French-speaking Canadians. Before establishing a definite percentage, further studies might be required to determine how many Canadian communities would be affected, as to whether the majority practical difficulties and approximate costs of such change, and to provide solutions to the most apparent difficulties. While an obvious formula for an objective test of circumstances and may fail to take into account local particularities, a formula of this kind is the most appropriate, at least outside Quebec. Yet do we see any reason, other than tradition, to deny the application of the same formula to Quebec municipalities? We have pointed out, Quebec municipalities are not bound to provide services in two official languages, and that the legal minority rights in the law, for example, the civil population. The cost and advantages. The examples from bilingual municipalities can be provided only to the two important municipalities provided in the Bilingual Code in the special cases. Naturally, making such Quebec from bilingual cities in the respect, even as far as municipal laws, which fall within the powers of section 133 of the B.N.A. Act, are concerned.

On the other hand, it would be practically impossible to provide comprehensive guarantees to the French minorities outside Quebec without giving equivalent protection to the English minorities in Quebec. The formula of 20 per cent which we have proposed is more practical in the other provinces would have considerable implications. Quebec alone we might suggest that the proportion of 20 per cent be modified. However, while the formula would appear to be the most just to the communities it would not appear to be the most practical. The formula would be able to cover the required proportion outside Quebec in a matter of a few minutes. There is still to make an estimate, throughout the country. It will be enough that in bilingual cities we suggested in connection with courts of justice.

A. Introduction

9.01. In the previous chapter we have seen that the language in which some aspects of the administration of municipal affairs or even of private activities are conducted may be subject to legal regulation. The same situation obtains at the provincial or federal level. The language in which the authorities must communicate with the citizens or advise the public at large, the language of the official forms and returns a citizen must submit to the authorities, the language in which certain products which are toxic or dangerous must be labelled, is frequently regulated by law. Even the linguistic aspects of a number of professional activities can lead to legislation: the language qualifications for admission to the practice of a given profession; the minimum knowledge of the current language needed for certain trades, particularly those, such as mining, requiring the observance of safety measures; and the language in which qualifying examinations can or must be passed. Even private papers—when their importance to society at large warrants it—can require linguistic regulation: for example, the documents, bills of lading, and notices issued by public carriers; labour contracts; and trade marks.

The purpose of the present chapter is to examine the federal and provincial legislation dealing with these ancillary aspects of public administration. The prime purpose of the laws and regulations discussed in the present chapter is not so much to govern language use as to regulate certain official or private activities. On the other hand, the linguistic aspects of such regulations both reflect the attitude of a given jurisdiction to linguistic rights and underscore the complexities of governing a bilingual or multilingual society. It will be recalled that the British North America Act does not contain any provision for the language of administration since section 133 is limited to stipulating the language of legislation and court proceedings in the federal jurisdiction and Quebec.¹ In fact, as we shall see in Chapter XIII, language as such does not have a clear legal status in most Canadian jurisdictions. Such legislation as there is on the subject is generally incidental or secondary.

9.02. Bilingual administration of public affairs has a tradition in Canada which goes back to the earliest days after the cession.² However, formal legislative recognition of the right of citizens to communicate with, and receive communications from, the administration in both languages began to appear regularly only around the middle of the last century. For instance, in 1845 we find that the returning officer, upon receipt of a writ of election of the Legislative Assembly of Lower Canada, must cause public notice to be given of the date of the election in both French and English.³ A number of private or public statutes in the same year require specified public notices to be bilingual.⁴ An 1849 consolidation of the electoral laws of the united Canadas provides for public notice of the writ of election and for proclamation of the returning officer's commission to be made "in the English language in Upper-Canada and in the English and French languages in Lower-Canada."⁵ Some statutes just prior to Confederation require public notices to be given but do not stipulate the language in which these have to be made: for example, wharfingers and warehousemen have to advertise unclaimed goods in the cities of Quebec and Montreal,⁶ notices of sale of immovables by forced licitations are simply said to have to be given in the *Canada Gazette* (although the *Gazette* was bilingual),⁷ the language in which clerks of the peace in Quebec, Montreal, and Trois-Rivières are required to advertise unclaimed goods for sale is not specified.⁸

On the other hand, the 1861 Corporate Rights Act provided for notice in both languages of the sale of immovables belonging to illegal corporations and of writs of mandamus to order the election of officers.⁹ Bilingual notices in newspapers and at church doors of the sale of seized immovables belonging to unknown persons were provided for in another statute.¹⁰ Provisions were also made for bilingual notices in all matters of insolvency,¹¹ of general meetings of mutual insurance companies,¹² and for the first meeting of subscribers to the Mount Royal Railway Company.¹³

These provisions are typical of the expressed desire of the legislators to ensure the adequate circulation and comprehension of public notices. They also show an awareness of the bilingual character of the society at which they were aimed. Presumably other provisions of a similar type exist on the pre-Confederation statute books, but they would only provide additional illustrations.

B. Public Notices

9.03. A multitude of laws require official bodies or individuals to give certain public notices by publication in the official Gazettes or in designated newspapers, or both, or in a variety of other fashions. Much of this legislation contains provisions governing the language in which these notices are to be published. Naturally, this is particularly true of Quebec statutes, but, as we shall see, some provisions are also found in the statutes of other provinces and the federal government.

9.04. *Federal law.* Many federal statutes deal with the language of public notices. For instance, the Bank Act provides that certain notices of sale of property covered by security, when the sale or the property is in Quebec, must be made in both an English- and a French-language newspaper.¹⁴ The Canada Elections Act requires notices of grant

of a poll to be published in both languages.¹⁵ The Act also provides in section 18 (1):

Within two days after the receipt of the writ of election or within six days after he has been notified by the Chief Electoral Officer of the issue of such writ, whichever is the sooner, the returning officer shall issue a proclamation . . . in the English and French languages in every electoral district in the Provinces of Quebec, Manitoba and New Brunswick, and in every electoral district where it should be done in the opinion of the Chief Electoral Officer, and in the English language only in other electoral districts

Copies of the notice of grant of a poll shall be issued in the same manner.¹⁶ The Civil Service Act states that notice must be given in English or French, or both, of a proposed competition "as . . . will give all eligible persons a reasonable opportunity of making an application."¹⁷ The Public Service Employment Act¹⁸ provides for notices in French or English, or both, as the case may be, of proposed competitions, and more elaborate provisions of the same nature are set forth in the Public Service Employment Regulations adopted pursuant to the Act.¹⁹ Under the Quebec Savings Banks Act public notices by the directors of the holding of an annual or other meeting of shareholders shall be given in a newspaper at the place of the head office and the notices published "shall be printed in both the English and French languages."²⁰ A similar notice is required for a declaration of dividends.²¹ A notice of sale by auction of securities held as collateral by the bank must be given in at least two newspapers in or nearest to the place of sale, one of which newspapers must be English and the other French.²² The Railway Act requires all notices given in Quebec to be published in both English and French.²³ Time-tables which are to be used within the limits of the province of Quebec must be printed in both languages.²⁴ Blackboard notices of overdue trains and expected arrivals shall in the province of Quebec be written in English and French and in all other provinces in English,²⁵ and signboards at all railway crossings in Quebec must, on pain of a maximum fine of \$40, be in both languages.²⁶ The Winding-Up Act requires notice of application for a winding-up order of a bank whose head office is in Quebec to be published in one English-language and one French-language newspaper.²⁷ Many federal statutes contain notice requirements without prescribing the languages.²⁸

Some federal subordinate legislation also contains relevant provisions. The Immigration Regulations provide for notices in French and English as well as in the language spoken by the majority of immigrants on board a ship bringing immigrants to Canada to advise them as to food facilities, safety rules, and the protection of immigrants.²⁹ The Penitentiary Service Regulations require the Commissioner of Penitentiaries to give notice of examination for candidates to positions in the Penitentiary Service "in the English or French language, or both."³⁰

9.05. *Quebec law.* Because of the linguistic distribution of population in the province and its bilingual traditions, Quebec has the most thorough and complete legislation dealing with the language of public notices. There are three basic categories of public notices in Quebec: those which are required to be published in the *Quebec Official Gazette*; those which must be printed in newspapers alone or in newspapers and/or in a different manner; and notices which must be posted or given in a different manner. The general rule is found in section 23 of the Provincial Secretary's Department Act:³¹ "All adver-

tisements, notices, and documents whatever, which are required to be published, shall be published in the Quebec Official Gazette, unless some other mode of publication is prescribed by law." The Act contains no provisions as to the language of notices published in the *Gazette*.³² Consequently several statutes stipulate specifically that publication in the *Quebec Official Gazette* must be bilingual,³³ but normally statutes in Quebec merely mention the requirement of publication in the *Gazette* without specifying that publication must be in both languages.³⁴ The practice, however, is for all publication in the *Quebec Official Gazette* to be bilingual.³⁵ Furthermore, in addition to publication in the *Gazette*, the law frequently also requires insertion of the notice within a specified time in French and English newspapers.³⁶

In addition to notices which are required to be published in both the *Quebec Official Gazette* and various newspapers, there are numerous provisions of law requiring the publication of certain other notices in newspapers. Normally the law states specifically that such notices are to be published in both French and English, or that they have to be published in a French and an English newspaper.³⁷ In the latter case the underlying assumption is that the notice will be published in French in the French-language newspaper and in English in the English-language newspaper. This is the normal procedure, but in the absence of specific provision to that effect, one may wonder whether publication in newspapers published in both languages of such notices drawn up in French only or English only would meet the demands of the law.

When newspapers published in both languages do not exist in the area where the notice is required to be given, provision is normally made for publication in a newspaper in the nearest locality,³⁸ or sometimes in newspapers of designated key cities.³⁹ Other statutes provide that in the absence of both French and English newspapers in a given area, the notice is to be published in both languages in the *same* newspaper.⁴⁰ Some recent Orders-in-Council stipulate that calls for tenders on public works be published simultaneously in both languages in a newspaper published in each language in the region where the work is to be executed, or in default of such newspapers, in both languages in at least one paper published in the region.⁴¹ On the other hand, section 301 of the Education Act specifically forbids the insertion in both languages of a notice in a newspaper published in one language only. Sometimes, of course, no alternative is stated for the case when there is no newspaper in the area, and this omission may pose delicate legal problems.⁴² Also, while normally the statutes refer to the locality of *publication* of a newspaper, with the widespread and province-wide distribution of daily newspapers, it might be advisable to specify as a criterion *circulation* rather than publication within the district. To our knowledge the only statutes which refer to circulation rather than publication in a given area are the Public Health Act in section 82, the Montreal Catholic School Commission Act in section 10 and the Cities and Towns Act in section 373. The legislator also often fails to distinguish between daily newspapers and publications, such as semi-weekly papers and weeklies, which are published less frequently.⁴³

In addition to publication in the *Quebec Official Gazette* or in newspapers, notices are sometimes required to be posted in specified places.⁴⁴ In one statute an alternative is given between posting and newspaper notices.⁴⁵ Article 1682c of the Civil Code dealing with carriers provides as follows: "The following shall be printed in French and in

English: passenger tickets, baggage checks, way bills, bills of lading, printed telegraph forms, and contract forms, made, furnished or delivered by a railway, navigation, telegraph, telephone, transportation, express or electric power company, *as well as all notices or regulations posted in its stations, carriages, boats, offices, factories or workshops.*"⁴⁶

Sections 305 and 306 of the Education Act are the only provisions in Quebec for special notices in the language of the person to whom they are addressed. Section 306 states that if the person to whom the notice is addressed speaks neither English nor French or speaks both languages, then the notice may be given in either language. Attention should also be drawn to article 1682c of the Civil Code quoted in the preceding sub-paragraph which requires printing in both languages of a number of documents and notices issued by common carriers. Section 555 of the Education Act provides that: "A summary of the minutes of each meeting of the administrative commission for the pension fund for officers of primary education shall be published in English and French journals of education in the Province designated by the chairman of the administrative commission of the pension fund." The Revenue Department Act states:

The Minister, whenever he shall deem it conducive to the better administration and carrying out of the revenue laws, may, at the public expense, cause to be prepared, printed and distributed, in the English and French languages, or in either, and in such numbers and manner as he may see fit, pamphlets containing such acts or portions of acts, regulations of the Lieutenant-Governor in council, and instructions from the Department relating to the revenue, as he may deem desirable.⁴⁷

9.06. *The law of other provinces.* The statutes of provinces other than Quebec contain very few provisions relating to the language of required public notices. It is generally taken for granted that the language need not be specified as it is bound to be English.

One Saskatchewan statute specifically states that named business establishments must post certain notices in the English language.⁴⁸ The Saskatchewan Elections Act⁴⁹ provides for proclamations in the English language of nominations, election dates, and similar information. On occasion the form of a notice is printed in the statute itself and it is naturally in English.⁵⁰ An interesting recognition of the presence of the French ethnic group, although not necessarily of its linguistic rights, is found in the Saint-Boniface College Scholarship Fund Act⁵¹ which states: "The auditor shall furnish to the board of directors a statement, certified by him to be correct, setting forth the results of the audit and his recommendations if any; and the board of directors shall publish in a newspaper having circulation in the French speaking communities in Manitoba, a copy of the statement and of the certificate of the auditor." The only provision we have been able to find outside Quebec which specifically requires publication of a notice in both French and English is the New Brunswick Act dealing with the town of Grand Falls⁵² which states: "All notices required by this Act shall be printed or written in both English and French in the same document."

C. Signs and Labels

9.07. We saw in connection with municipalities⁵³ that individuals or corporations may be required to post certain signs or place certain labels on certain types of equipment or of certain products. A limited amount of similar legislation is also found in higher jurisdictions.

Federal law. We have already mentioned the provisions of the Railway Act. In addition, the Customs Tariff provides that the cabinet may order goods imported into Canada to be marked, stamped, branded, or labelled "in legible English or French words."⁵⁴ The Opium and Narcotic Drug Act requires the formula or true test of ingredients to be printed on a label as well as a warning if the drug contains codeine, but does not stipulate the language.⁵⁵ The Pest Control Products Act provides for the labelling of packages containing pest control products, but does not refer to the language thereof.⁵⁶ Nor is the language to be used specified in the Precious Metals Marking Act⁵⁷ or the Patent Medicine Act.⁵⁸ The Fertilizer Regulations of the federal Department of Agriculture provide that when fertilizer is sold in Quebec the required information must be printed in both French and English (French not being required in other provinces) and that in no case must the information be printed in a foreign language.⁵⁹ The Food and Drug Regulations provide by implication that drugs or vitamins must have a French or English name.⁶⁰

Quebec law. A number of Quebec statutes require certain types of notice: the Highway Code (signs bearing the words "school bus" or "écoliers");⁶¹ the Election Act (badges worded "Énumérateur Québec Enumerator");⁶² Public Buildings Safety Act (signs in large characters bearing the words "exit" or "sortie");⁶³ the Railway Act (signboards with the words "railway crossing" or "traverse de chemin de fer").⁶⁴ The last also requires in section 154: "The directors shall print and post up, or cause to be printed and posted up, in the office, and in all the places where the tolls are to be collected, in some conspicuous place, a printed board or paper exhibiting, in French and English, all the tolls payable, and specifying the price to be charged or taken for carriage of any matter or thing." This provision should be compared with article 1692c of the Civil Code dealing with carriers.⁶⁵

Attention should also be drawn to the Quebec Food Regulations adopted on March 15, 1967,⁶⁶ section 38 whereof renders obligatory on all food sold under the provisions of the Quebec Agricultural Products and Food Act⁶⁷ markings and notations in the French language:

All markings and notations relating to the product, in whatever manner or form they may be, must be exact, truthful and sincere, and must not be susceptible to [*sic*] any possible confusion or misunderstanding.

The use of French is obligatory in all inscriptions, and inscriptions in another language must not take precedence over those in French. This regulation does not apply to a document accompanying the sale and drawn up in the language of the buyer.

The law of other provinces. In other provinces there are provisions for certain labels, all of which require that the wording be in English.⁶⁸ For instance, the Saskatchewan

Pharmacy Act provides that the list of contents and warning in connection with the administration of codeine to a child under the age of two years shall be in English.⁶⁹

D. Official Forms and Returns

9.08. With the growth of social control of private activities, individuals and corporations are required increasingly to fill in certain forms or to make reports or returns to government authorities. Normally the language of such forms or returns is not specified. It is taken for granted that the returns may be made in the language or languages current in the jurisdiction concerned. In Quebec and Ottawa the practice is to have such returns in either French or English at the option of the person reporting to the authorities, but there is no legislative definition of this right which is based on custom.

Federal law. The Bank Act requires that copies of a bank financial statement be sent to the minister and published in the *Canada Gazette*⁷⁰ and also contains a multitude of other references to statements and documents which have to be submitted, all of them without stipulating the language of such submissions. The Excise Tax Act states that every person required to pay or collect taxes or place stamps "shall keep records and books of account in English or French" available for inspection.⁷¹ The Canadian Citizenship Act⁷² requires various declarations from applicants for citizenship. While the forms are standard and in English and French combined, or sometimes in separate English and French versions, we were advised by a letter dated October 26, 1965, from Mr. R.E. Williams, legal adviser to the Department of Citizenship and Immigration, in reply to inquiries we had made, that any declaration could be completed in either English or French (or, for that matter, in any other language). The necessary translation would be provided by the Registrar when necessary.

We also draw attention to section 34 of the Trade Mark Rules⁷³ which allows the Registrar to require an applicant for registration of a trademark to furnish him for indexing purposes with a description of the trademark and a "translation to English or French" of any words in any other language appearing in the trademark.

Alberta. In the Alberta Companies Act we found the following provision which seems to place French on the same level as any foreign language since it permits companies to make returns only in English:

Except where the Company is a private company the annual return shall include a written copy, certified by a director or the manager or secretary of the company to be a true copy, of the last balance sheet that has been audited by the company's auditors, including every document required by law to be annexed thereto, together with a copy of the report of the auditors thereon, certified as aforesaid, and if any such balance sheet is in a foreign language there shall also be annexed to it a translation thereof in English, certified in the prescribed manner to be a correct translation.⁷⁴

Manitoba. The Manitoba Workmen's Compensation Act somewhat cryptically provides that a notice of injury or of death "shall be in ordinary language,"⁷⁵ presumably

English. On the other hand, the Manitoba Employment Standards Act seems to give official recognition to the French language by requiring employment records to be kept in English or French according to the language of the employee:

Unless the minister authorizes him in writing to dispense therewith, every employer shall maintain in his principal place of business in the province a true and correct record in the English language or, if he is a French-speaking person a similar record in the French language, of the following particulars in respect of each of his employees:

- (a) The hours worked or on duty each day, showing overtime hours separately.
- (b) The rate of wages at which the employee is employed.
- (c) The dates upon which wages have been paid to each employee.
- (d) The amount paid on each such occasion.
- (e) The amount of every deduction made from wages and the particulars thereof.
- (f) The date of commencement of present term of employment.
- (g) The occupation of the employee.
- (h) Where an employee works or is on duty on a general holiday, the rate of wages paid therefor.
- (i) Each annual vacation granted, showing
 - (i) the date of commencement and the date of completion of the vacation;
 - (ii) the period of employment in respect of which the vacation was given;
 - (iii) the amount of vacation pay given and the date upon which it was paid.
- (j) The amount of money paid in lieu of an annual vacation upon termination of employment, and the date of such payment.
- (k) The date when employment ceases.⁷⁶

New Brunswick. At one time New Brunswick medical practitioners were permitted to prescribe liquor necessary for health reasons in either English or French,⁷⁷ but this provision has been repealed.⁷⁸

We also found that an amendment to the Municipal Debentures Act requires that forms AA and BB be in French,⁷⁹ and that the 1958 statute dealing with the town of Grand Falls requires that ballot papers be bilingual.⁸⁰

Newfoundland. The Companies Act⁸¹ provides that "where any document required to be filed under this section is not in the English language, the Registrar may require a translation thereof notarially certified."

Quebec. The usual practice is to permit all returns to be in either French or English, and practically all official forms are in both languages. Attention should be drawn to the following provisions of the Workmen's Compensation Act:

20.(1) Subject to subsection 5 of this section, compensation shall not be payable unless notice of the accident is given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured and unless the claim for compensation is made within six months from the happening of the accident, or, in case of death, within six months from the time of death.

(2) The notice of the accident shall give the name in full and address of the workman and shall be sufficient if it states in ordinary language the cause of the injury and where the accident happened.

21.(1) Every employer shall, within the two working days after the happening of an accident by which a workman in his employ is disabled from earning full wages

or which necessitates medical aid, notify the Commission in writing

(2) The notice shall be drawn up in the mother tongue of the injured person if that is English or French, and otherwise in whichever of such tongues he chooses. It shall not be signed by him unless all the blanks have been filled in and the employer shall give him a complete copy thereof.⁸²

The Education Act,⁸³ the Cities and Towns Act,⁸⁴ and the Quebec Temperance Act⁸⁵ all provide for ballots and electoral forms in both languages. Section 12a of the by-laws of the College of Dental Surgeons of the province of Quebec⁸⁶ provides that ballots and official envelopes be printed in both French and English.

E. Languages as a Legal Requirement for Official, Professional, and Private Employment

9.09. Most positions in the civil service and in the government are not regulated by special language provisions. While we have not conducted specific research on the operations of the civil service, we have nevertheless studied the various statutory rules and regulations dealing with the language requirement for admission to certain positions in the government, the professions, and even private industry.

Federal law. The Canada Medical Act provides that a majority of the committee conducting the examination of any candidate shall speak the language in which the candidate elects to be examined.⁸⁷ Admission to citizenship requires an adequate knowledge of either English or French.⁸⁸ Under the Civil Service Act it is permitted to hire employees qualified in either or both languages as the need arises.⁸⁹ Furthermore, there are a number of pertinent federal regulations. The Civil Service Regulations used to provide for the right of candidates to write examinations in either English or French except where a bilingual candidate was required,⁹⁰ but both these provisions have disappeared from the 1962 revision of the regulations. The General By-law for the Montreal Pilotage District adopted pursuant to the Canada Shipping Act, states that no application for admission to the pilotage service shall be accepted from a person who is unable to speak and understand both French and English.⁹¹ The same rule is found in the General By-law of the Quebec Pilotage District.⁹² The Penitentiary Service Regulations provide for preference to be given to candidates for positions who, all other things being equal, are "qualified in the knowledge and use of both the English and French language,"⁹³ while section 1.35 states: "The number of members appointed to serve in any headquarters or in any institution who are qualified in the knowledge and use of the English or French language or both shall, in the opinion of the Commissioner, be sufficient to enable the headquarters or institution to perform its functions adequately and to give effective service."

Alberta law. As we have seen, the Municipal Districts Act provides that: "No person is qualified to be elected a member of the council of a municipal district unless at the date of his nomination (a) he can read and write in the English language."⁹⁴ The Alberta City Act requires that all candidates to the mayoralty or the council of a city must "speak, read and write the English language."⁹⁵ The Coal Mines Regulation Act stipulates

that no one shall be granted a miner's certificate or a provincial miner's certificate unless "he has a sufficient knowledge of the English language to give and understand working directions and warnings" and that no one shall hold or be granted a miner's permit unless "he has sufficient knowledge of the English language to understand working directions and warnings."⁹⁶

British Columbia law. The Metalliferous Mines Regulations Act provides that no person shall be granted a provisional or permanent blasting certificate "unless he is able to give and receive orders in the English language." Furthermore, no shift boss certificate shall be granted to any applicant who is not "conversant with the English language."⁹⁷

Manitoba law. Some interesting provisions are to be found in the Manitoba statutes. Under the Public Schools Act no one can qualify as a trustee of a rural school or a municipal school district or a school division⁹⁸ unless he is "able to read and write English." The charters of the cities of Brandon⁹⁹ and East Kildonan¹⁰⁰ declare that no one is eligible for election as mayor or alderman unless he is able to read and write the English language. On the other hand, the Metropolitan Winnipeg Act states that to qualify for election as member of the metropolitan councils it is sufficient to be "able to read the English or French language and write it from dictation."¹⁰¹ We also draw attention to the statute incorporating the Saint-Boniface College Scholarship Fund, which states that the board of directors of the corporation shall consist of 13 members "who shall at all times be French-speaking and of the Roman Catholic Faith."¹⁰²

New Brunswick law. The only relevant provision found is the Act to incorporate l'Association des Instituteurs Canadiens,¹⁰³ section 7 of which provides that all French-speaking teachers whose membership fees have been duly paid are members of the association.

Northwest Territories law. The Jury Ordinance stipulates that to qualify as a juror in the Northwest Territories a person must be "able to speak and write the English language."¹⁰⁴ The Coal Mines Regulation Ordinance forbids the appointment of anyone "unable to speak or read English" to a position of trust or responsibility in or about a mine.¹⁰⁵ The School Ordinance seems to recognize the right of parents to have their children educated in a language other than English by providing for teachers qualified to teach in a foreign language:

The Board may subject to the regulations employ one or more competent persons to give instruction in any language other than English in the school of the district to all pupils whose parents or guardians have signified a willingness that they should receive the same but such course of instruction shall not supersede or in any way interfere with the instruction by the teacher in charge of the school, as required by the regulations and this Ordinance.¹⁰⁶

Ontario law. Some indirect recognition of the French fact is found in Ontario statutes dealing with education. The Teaching Professions Act stipulates that the Board of Governors of the Federation shall consist, among others, of five representatives of l'Association de l'Enseignement Français de l'Ontario.¹⁰⁷ The Ontario School Trustees' Council Act states that the council shall consist, among others, of representatives of l'Association des Commissaires des Écoles Bilingues d'Ontario.¹⁰⁸ On the other hand, the Mining Amendment Act provides that every foreman "shall be able to give and to receive and under-

stand orders in the English language” and that every person in charge as a deckman, cagetender, skiptender, or hoistman “shall have a knowledge of the English language adequate for enabling him to carry out his duties in a thoroughly safe manner.”¹⁰⁹

Quebec law. The Jury Act disqualifies as jurors persons who do not speak either English or French fluently.¹¹⁰ Even in juries *de medietate linguae* jurors are not required to be bilingual, but to speak either English or French, depending on the panel to which they belong.¹¹¹ The Bailiffs’ Act states that no one shall be admitted as a bailiff of the Superior Court unless he is able to write either English or French “with sufficient grammatical correctness.”¹¹² The Provincial Police Force Act used to require all members of the Force to have a fair knowledge of both English and French,¹¹³ but this requirement has been eliminated.¹¹⁴ The Fire Investigations Act demands that the secretary of the Fire Commissioner of Montreal speak and write “the French and English languages correctly.”¹¹⁵ The Medical Act provides that the examiners whom the provincial Medical Board shall assign to Laval University at Quebec and to the University of Montreal shall be French-speaking physicians and that those whom it shall assign to McGill University shall be English-speaking physicians.¹¹⁶ The Dental Act states that the affairs of the college shall be conducted by a board of governors called the Provincial Board of Dental Surgery, which shall consist of representatives of the various dental faculties (hence French- or English-speaking as the case may be).¹¹⁷ The Engineers Act provides that a board of examiners to examine applicants for admission to the practice of the profession shall be appointed by, among others, the various universities in Quebec, indirectly implying a linguistic qualification.¹¹⁸ The Bar Act has a similar provision in relation to the board of examiners.¹¹⁹ Obviously the fact that a particular official is appointed from a French-speaking or English-speaking university does not necessarily imply that his mother tongue is that of his university, but it renders such a situation likely. A number of interesting linguistic provisions are found in the Parish and Fabrique Act:

31. Whenever, in a Roman Catholic Parish or in two or more neighbouring parishes, there exists a Roman Catholic minority speaking a language different from that of the majority, such minority or a portion of such minority may be erected into a distinct parish for all temporal purposes of their religion, and shall constitute a corporation under the name of “Congregation of the Roman Catholics of . . . speaking the . . . language.”

.....

33. The head of the family shall determine the nationality to which his family belongs; and whenever, in two parishes of different nationalities in the same territory, there is a contestation for the purpose of ascertaining to which of two parishes one or more families should contribute for religious purposes, the Roman Catholic ordinary in the diocese in which such parishes exist shall determine the parish to which such families shall contribute for the temporal purposes of religion.
34. The Roman Catholic bishop of the diocese in which such congregation exists may annex thereto the parishioners of a neighbouring parish, speaking the same language who apply to be thus annexed.¹²⁰

The Act respecting the Board of Roman Catholic School Commissioners of Quebec states that the board shall consist of seven members, one of whom must be of the English language.¹²¹ An identical provision is found in the Montreal Catholic School Commission

Act.¹²² According to regulations adopted under the Stationary Enginemen Act candidates to the title of inspector must speak both French and English "fluently," although for other positions a sufficient knowledge of one language will be enough.¹²³ The regulations adopted pursuant to the Industrial and Commercial Establishments Act¹²⁴ require that hoisting engineers "be able to speak and read the French or English language."¹²⁵

Saskatchewan law. The Saskatchewan School Act requires nominees for the office of school trustee to be able "to read and write and to conduct school meetings in the English language" and to subscribe a declaration to that effect.¹²⁶ The Larger School Units Act requires that trustees have the same qualifications as required in section 74 of the School Act and that in the candidate's acceptance and attestation there be a statement that he is able to read, write, and conduct school meetings in English.¹²⁷

Yukon law. The School Ordinance recognizes bilingualism in that it states that a person is qualified to become a school trustee if he "is able to read and write in either the English or French language."¹²⁸

F. The Language of Examinations for Official and Professional Employment

9.10. Another facet of the legislative regulation of language qualification is to be found in the regulation of examinations for admission to certain official positions or professions.

Federal law. The Canada Medical Act allows candidates for examinations to write them in either English or French.¹²⁹ Under the Civil Service Act examinations or interviews are conducted in English or French "at the option of the candidate."¹³⁰ The Civil Service Regulations state, "Any subject of any examination may be written in either English or French at the option of the candidate, but the choice of language must be made at the time of application."¹³¹ On the other hand, the Foreign-going Masters and Mates Examination Regulations state, "An applicant may be required to display his ability to write clear grammatical English in the form of an essay, a précis or an exercise in letter writing."¹³² The Masters and Mates of Home-Trade Inland and Minor Waters Vessels Examination Regulations state that all applicants "shall be required to pass the written examination in English."¹³³ The Penitentiary Service Regulations stipulate that examinations, tests, or interviews for applicants "shall be conducted in the English or French language, or both, at the option of the candidate."¹³⁴

Manitoba law. The University of Manitoba Act states, "The examination for any degree to be conferred by the University may be answered by the Candidate in either the English or French language."¹³⁵ On the other hand the Land Surveyors Act requires all candidates for admission to the study of surveyorship to pass an examination in, among other subjects, "English grammar."¹³⁶

Quebec law. The Medical Act provides that all examinations shall be conducted in English and French.¹³⁷ French and English are also stated to be the only official examination languages in the Veterinary Surgeons Act.¹³⁸ The Land Surveyors Act requires candidates for admission to the study of land surveying to have a "sufficient knowledge of one of the official languages," and to be able to translate "correctly" into the other

language.¹³⁹ The Notarial Act, on the other hand, requires candidates to know either French or English.¹⁴⁰ The regulations adopted under the Stationary Enginemen Act¹⁴¹ provide that examination questions are to be answered in either French or English.¹⁴² By-law 38 (5) of the Bar of the province of Quebec provides for the distribution of examination questions to applicants for admission to the Bar in both French and English.

G. Other Regulations of Private Activities

9.11. *Federal law.* The Trade Marks Act provides that a trademark is registrable if it is not either clearly descriptive or deceptively misdescriptive "in the English or French languages" of the character or quality of the wares or services in association with which it is used.¹⁴³ If the applicant bases his claim to a trademark or prior registration thereof in another country, he shall supply to the Registrar a certified copy of such prior registration together with a translation thereof in English or French.¹⁴⁴

The Immigration Aid Societies Act stipulates that any negotiable or other instrument authorized under the Act "may be drawn in any European language understood by the person executing it, and the sums of money mentioned therein may be expressed in any currency used in the country where it is executed."¹⁴⁵

We have mentioned that the Federal Railway Act requires that all time-tables and bills of lading to be used in the province of Quebec be bilingual, and that the Quebec Civil Code contains a similar provision.

Quebec law. As we have noted,¹⁴⁶ article 1682c of the Quebec Civil Code which stipulates that passenger tickets, baggage checks, way bills, bills of lading, printed telegraph forms, and contract forms supplied by public carriers in Quebec must be printed in both languages. Article 1682c was introduced into the Civil Code by the so-called Lavergne Act.¹⁴⁷ Some doubt was cast as to the legality of a province legislating on companies which fall under federal jurisdiction pursuant to section 92(10) of the B.N.A. Act. At the time, the *Canada Law Journal* editorialized as follows:

LANGUAGE v. LAW

The demand made by the leaders of the French population in the Province of Quebec that all railway tickets, time tables, etc., should be printed in French as well as in English, makes very clear some important features in our political condition. How a railway ticket can be printed in two languages when the name of the place remains the same in either, it is hard to understand, but the absurdity of the demand only emphasizes its political importance. Two facts stand prominently forth which are worthy of the consideration of those who speak so fervently and eloquently of the unity of the two races, and the consolidation of the Dominion as its happy result. The demand above referred to having been properly rejected by the Parliament of the Dominion, and improperly and illegally, in our opinion, accepted by the Provincial Assembly, and having after some demur been agreed to by the railway authorities, is removed from present controversy, but remains to point the moral if not to adorn the tale.

The facts to which we would call attention are, first, the evidence given of the tenacity with which, even in so trivial a matter, the French Canadian holds to his policy of maintaining intact the use of his language, the independence of his race,

and, secondly, the conclusion to be drawn from the easy yielding to so preposterous a demand by the railway companies, involving to them very considerable expense and inconvenience without any compensating advantage. When even a railway company has to take into account the loss it may sustain from the hostility of the population which it serves, based upon such trivial grounds as those above referred to, further comment is needless.¹⁴⁸

However, the right of provinces to regulate the property and civil rights aspects even of companies operating in a field which falls under federal jurisdiction was upheld two decades later by the Privy Council.¹⁴⁹ The formalities of contracts are deemed to be a provincial matter.

We have also noted that Quebec law requires individuals to give certain notices in one or both languages. Other relevant linguistic regulations of private activities are to be found in Quebec statutes. The most important of these provisions is section 51 of the Labour Code:¹⁵⁰ "Either party may demand that the agreement be drawn up in both the English and the French languages." Section 38 of ordinance 39 of 1962, dealing with forest operations,¹⁵¹ stipulates: "The employer must take the necessary steps to have the engagement contract, notices, regulations and other documents written in French or English, according to the language of the employee concerned."

In conclusion it might be said that no over-all legislative pattern exists either at the federal level or in Quebec. Languages in public administration are regulated entirely on an *ad hoc* basis. It is obvious that it is taken for granted that French and English enjoy equal status in Quebec but everywhere else, despite minor exceptions, when language provisions appear they are intended to ensure the primacy of English.

A. Introduction

10.01. An important area of public administration in which language rights may come into play is that of corporation charters, permits, and licences. This is a vast area to which we have only alluded and which we did not examine in detail. Although this field of activity is naturally germane to the objectives of the present research project, it did not fall within the strict bounds of the project and we had neither the time nor the resources to make an adequate study. It is to be hoped that this gap will be filled by other research projects undertaken for the Royal Commission or carried out subsequently. We have had occasion, however, to survey municipal practices in this connection,¹ but apart from this limited examination of municipal permits, we regret to say that we have left generally untouched the entire domain of government permits, licences, and certificates.² One aspect of the question about which we gathered sufficient information, however, is that of company charters. Corporations are artificial persons possessed of almost all the legal rights and duties of human beings. Most commercial corporations are created by letters patent issued by the competent provincial or federal government department, upon petition to that effect from private individuals. The charters of the more important commercial corporations (banks, insurance companies, national carriers, and the like), professional corporations (lawyers, doctors, engineers, and so on) and municipalities generally emanate from Parliament or the provincial legislature rather than by grant from an administrative entity. Parliamentary charters are granted by private or public bill. In this chapter, we are mainly concerned with the administrative rather than parliamentary creation of corporations.

B. Federal Incorporations

10.02. With respect to private corporations, the Canada Corporation Act always permitted companies to have a name in either English or French or in both languages.³ In

addition, section 26 provided for the right to change the name of a company by applying for supplementary letters patent to that effect. In other words, a corporation incorporated by letters patent could always apply for a French or English name or for both forms, either at its creation or at a subsequent date.

For corporations created otherwise than by letters patent, however, nothing less than an amendment to their original statute would suffice to change their name or to provide a translation thereof if they did not have a bilingual name.⁴ Of course, many statutory charters provided for bilingual names.⁵ As a result of an amendment to the Corporation Act⁶ section 208A was added. This enables such corporations to request the Secretary of State to provide them with a French or English form of their corporate name. The statutes referred to in section 208A(6) of the act are: the Canadian and British Insurance Companies Act,⁷ the Trust Companies Act,⁸ the Loan Companies Act,⁹ and the statutes of railways, telegraph, and telephone companies.¹⁰ The three statutes referred to specifically as "mentioned in paragraph (b), (c) or (d) of subsection (1) of section 5" were amended simultaneously by a single statute at the time of the foregoing amendment to the Corporations Act.¹¹

The amendment provides that an insurance company, a trust company, or a loan company may ask the Governor-in-Council (that is, the cabinet itself as against the Secretary of State, who is responsible for companies incorporated by letters patent) "to provide it with a French or English form of its corporate name." A notice of such request must be published in the *Canada Gazette* as must the order made pursuant to such request. There will thus no longer be any need to tie up the legislative process in order to make corporate names bilingual.

C. Provincial Corporations

10.03. A varying degree of recognition of the right to bilingual corporate names is given by the various provinces and territories. Our limited survey has disclosed the following situation:

Alberta. The legislature of Alberta has enacted statutes which emphasize the activities of the French ethnic communities in Alberta. Even though English is accepted as the official language of the province of Alberta,¹² we found many private acts which give to some corporations a corporate name written in French only. For example, there is the Association canadienne-française de l'Alberta, whose objectives are to promote the intellectual, moral, social, and material welfare of Canadians of French origin in Alberta, the study of the French language, and the formation of adult education groups.¹³ There is the Catholic Archdiocese of Edmonton,¹⁴ "which may establish parishes or missions within the Archdiocese with a corporate name of 'The Catholic Parish of . . . ' or 'The Catholic Mission of . . . ' or 'La Paroisse catholique de . . . ' or 'La Mission catholique de . . . '" The only corporate name of Les Soeurs de l'Assomption de la Sainte-Vierge de l'Alberta is French.¹⁵ The recognition of French corporate names is sometimes incidental to another statute.¹⁶

Manitoba. The same situation is found in Manitoba.¹⁷ The Manitoba Companies Act¹⁸ permits corporations to use "Limited" or "Ltd.", or in their French versions, "Limitée" or "Ltée." The act further provides in section 15 that:

Subject to section 25

(a) The name of a corporation may be set forth in its charter in both its French and English versions; or

(b) any corporation which has a name consisting of French and English versions, may be legally designated by the French or English version of its name, or by both versions.

Subject to section 25, nothing in sub-section (5) shall prohibit the name of a corporation from being in any language other than French or English.

New Brunswick. Here, while there are no general provisions concerning the use of the English and French languages, the statutes contain many examples of bilingual names of societies, corporations, hospitals, and associations. For instance, the Credit Unions Act provides that the name may be in English or in French: "Credit Union Ltd." or "La Caisse Populaire Ltée."¹⁹ The same act provides in section 3 that "the name of a federation incorporated under this Act shall contain in the English or French language, the words 'Credit Union Federation' and as the last word of its name the word 'Limited' or some abbreviation thereof."

The Co-operative Associations Act provides that "the name of an association incorporated under this Act shall contain in the English or French language the word 'Co-operative' or some abbreviation thereof and as the last word of its name the word 'Limited' or some abbreviation thereof."²⁰ We found many private acts which incorporate hospitals, associations, societies, and corporations with a French name and sometimes with both French and English names.²¹

Newfoundland. The Companies Act²² provides that "where any document required to be filed under this section is not in the English language, the Registrar may require a translation thereof notariially certified."

Northwest Territories. In 1902 Les Soeurs de Charité de la Providence des Territoires du Nord-Ouest were incorporated by an ordinance of the Territories.²³

Nova Scotia. We found a limited use of French in Nova Scotian corporate names. The Co-operative Associations Act provides that "where the name of an association is stated or expressed in French, the words 'Co-operative' and 'Limited' as part of the name may be expressed or stated in the French equivalent of those words."²⁴ Les Religieuses Hospitalières de St-Joseph, Villa St-Joseph-du-Lac, were incorporated by statute in 1961.²⁵ In the same year, the Acadia Insurance Company was authorized to use a French name.²⁶

Ontario. French names are occasionally found in Ontario statutes incorporating, or referring to, various corporate entities.²⁷

Quebec. In Quebec corporations have been chartered in either or both languages from time immemorial. Letters patent are in either French or English, depending on the language of the petition. The name demanded can be either French or English or both. However, until 1960, if a company was granted a name in both French and English, it had to be designated simultaneously by both names. In that year, section 31 of the Quebec Companies Act²⁸ was amended²⁹ to read, "If the company has a French and an English

name, or a name consisting of a French and an English version, it may be legally designated by its French name or its French version thereof, or by its English name or the English version thereof, or by both names or both versions." A bilingual name will be granted provided the translation from one language to the other is as accurate as possible.³⁰ The many corporations created by statute generally, but not always,³¹ have bilingual names.

Saskatchewan. In this province we found only passing references to private corporations having French names.³²

Yukon. Despite our conclusion that the Yukon is still officially bilingual,³³ the Companies Ordinance provides for: "A true copy of the charter and regulations of the Company, verified in the manner satisfactory to the Registrar and showing that the company by its charter has authority to carry on business in the Territory; and if any instrument included in the aforesaid is not written in the English language, a notarially certified translation thereof."³⁴

D. Conclusion

10.04. Our survey is far from complete, let alone exhaustive. We have not obtained any statistical data. What we have learned is that most Canadian provinces do not seem to object to incorporating companies that have either a French name only or a bilingual name. Naturally this does not mean that the letters patent or the incorporating statute will be in French alone or even in both languages. Nor does it mean that such corporations are given the right to regulate their affairs, draft their by-laws and minutes, and make their returns in a language other than that used within the jurisdiction to which it is accountable. Nor, for that matter, do we have any evidence that the right which is granted to French applicants to incorporate in French or in both languages would not also be granted to persons desiring to adopt a corporate name in any other foreign language. In short, the willingness to grant French or bilingual corporate names is in no way synonymous with the acknowledgement of substantive linguistic rights. At best, it constitutes a very minor element of the legal status of a language in the community. Furthermore, the increase in the number of corporations requesting bilingual names is an indication of their awareness of the need to respect the feelings of French-speaking Canadians with whom they might have to deal.

11.01. Many governmental activities in Canada are governed by federal-provincial agreements. These agreements are executive acts, rather than legislative enactments. In other words, they normally take the form of agreements entered into by the various provincial governments with the federal government. As a result, they appear to have been regarded by the federal departments involved as private agreements between themselves, on the one hand, and the provincial government and/or provincial departments, on the other. One consequence of this seemingly prevalent attitude has been the absence of any fixed rules relating to their publication. While a number of these agreements are published in the *Canada Gazette* or the provincial *Gazettes*, a very considerable number are not published anywhere, although copies can be obtained from the departments concerned. Since the purpose of the present chapter is to determine the linguistic practices followed by both levels of government in conducting this very important sector of their legal business, this situation has considerably complicated our research. Nor has it rendered easier our secondary aim of studying the language or languages in which these agreements are prepared by the departments of the federal government.

A. Methods of Research: A Questionnaire

11.02. We were confronted both with the absence of any systematic publication of federal-provincial agreements and with the total absence of any organized compilations or collections of those agreements which are in print. Furthermore, we discovered that some agreements are published only in part, at least when the department concerned has discretion and deems it advisable. With others, publication is required by the enabling federal or provincial legislation.¹ An illustration of the practical difficulties to which this situation can lead is our inability to locate the official texts of the federal-provincial tax agreements of 1941-2, despite the willing assistance of the department of Finance and the staff of the Public Archives of Canada! The department of Agriculture had to spend

several months trying to find 13 agreements entered into with Quebec between 1912 and 1940 pursuant to the Agricultural Aid Act of 1912-13 and the Agricultural Instruction Act of 1913. The solicitor of one department wrote us on September 10, 1965, that he could not complete the questionnaire, for the following reason among others: "There have been numerous agreements with the Province of Quebec over the years but we have no count of them. To make an accurate tabulation would require considerable research and much time. Nor would it be possible to determine with facility which agreements are still in effect."

It should also be noted that, while federal-provincial agreements have been widely studied by political scientists,² jurists do not seem to have devoted their attention to them. We have been unable to find a single legal study of federal-provincial agreements. Nowhere in Ottawa, or anywhere else for that matter, is there a central registry for such agreements. Each department charged with the administration of a federal-provincial agreement is regarded as its repository and guardian. Since, as we have seen, government departments do not always regard it as their duty to publish the agreements for which they are responsible, the only way in which we could hope to make a relatively thorough survey was to approach each department. A number of interviews were conducted with responsible departmental officers. Not only was this method time-consuming but often the officers concerned could not provide the information requested and had to order searches within their own departments. In order to obtain the desired information we then decided to send a detailed questionnaire³ to each department of the federal government and to the following five federal agencies: the Dominion Bureau of Statistics, National Energy Board, Atlantic Development Board, Central Mortgage and Housing Corporation, and Atomic Energy Board. Virtually every department and agency replied.⁴ The questionnaire itself was prepared after a number of interviews with various officers of the federal government. The following definition was adopted for the purpose of the questionnaire: "The questions refer to those Agreements involving questions of policy and expenditure of money, which may be said to be Federal-Provincial Agreements, not minor administrative transactions which your Department may have from time to time with a Provincial Department."

The definition attempted to exclude a very large number of minor land and similar transactions which all federal departments must necessarily make in the course of their administration and for the purpose of which they must deal with provincial departments. Also, on the basis of this preliminary research, we found that in practice there were three types of federal-provincial agreements and that the questionnaire should distinguish between them. These three basic categories are: (1) agreements made in virtue of special federal enabling legislation (one of the most important examples thereof being the ARDA agreement); (2) agreements made by departments under the general power given to them to conclude agreements with provinces under approval by Order-in-Council; and (3) agreements negotiated directly and less formally by a federal department with its provincial counterpart.

11.03. Before reviewing the replies and information gained from the questionnaire, however, we think it advisable to examine the manner in which federal-provincial agreements are ordinarily prepared, what the language practices are, and what role the depart-

ment of Justice plays. The information given is generally based on a series of interviews conducted with responsible officials.

B. How Agreements Are Prepared

The manner of preparing federal-provincial agreements depends in part on the complexity and importance of each agreement. A tax-sharing agreement or a major agreement on sharing welfare costs will be prepared in a more elaborate manner than an agreement dealing with the extermination of mosquitoes in northern Ontario and Quebec. Certain of the most important agreements are prepared simultaneously with the enabling federal and provincial legislation devoted to the subject-matter of the agreement. This was the procedure with the Canada Pension Plan and the ARDA agreements. The first two types of agreements described above (agreements made in virtue of special federal enabling legislation and under the general power to conclude agreements approved by Order-in-Council) are often planned and drafted in the standing federal-provincial ministerial committees that exist now in virtually every field of administration and that meet at least annually if not more frequently. The best known of these is the Committee of Prime Ministers. While a number of federal-provincial agreements have emanated from this committee, most agreements originate with standing ministerial committees in which interested ministers and their departmental advisers meet to discuss matters of mutual concern. A number of agreements are also prepared at *ad hoc* meetings formed to deal with emergencies (for example, in agriculture) or with broad problems of finance and welfare which require considerable consultation before any joint action can be undertaken by the various governments. The process of negotiation may involve considerable bargaining and result in substantial amendments to any texts which are submitted to such committees. It appears to be usual for one of the parties, either the federal government or an interested provincial government, to prepare the initial draft of the proposed agreement. As a rule, the initial draft is prepared by federal officials. This draft is then discussed and modified by the committee. Once agreement has been reached, the text is signed by the respective ministers who exchange it with their opposite numbers and then maintain authentic copies in their files.

C. Linguistic Practice

11.04. As to the languages in which official texts of federal-provincial agreements are drawn up, there is at least one universal rule, namely, that all agreements with provinces under common law are negotiated, drawn up, and signed in the English language only. With respect to Quebec, however, the practice varies considerably, not only from department to department, but within departments. Some agreements exist in equally authentic French and English versions; some exist in both languages but with one language having priority in the event of conflict; some are in English or in French only, with the translation in the other languages; still others are unilingual and have no translation. It should

be noted that the same variations appear to exist in interprovincial agreements signed by Quebec with other provinces. At least one department reported that the French text of agreements that were drawn up in both French and English was referred to the department's opposite in Quebec for full textual consideration. In fact, the policies relating to the language of official agreements with Quebec vary enormously, as will be noted from the analysis made hereinafter of the replies to the questionnaire. Some departments prefer to have their agreements in French only, in order to avoid any possible textual conflicts. Other departments insist on doing all their business in English. As for those departments which prepare agreements in both languages, they indicated that negotiations were not seriously complicated by the necessity of discussing the two versions of the text.

D. The Role of the Department of Justice

11.05. While, as we have seen in 3.21, the department of Justice is attempting to participate increasingly in the preparation of subordinate legislation, it is not following the same practice with federal-provincial agreements, where there does not seem to be any set role for the department. The department itself prefers to view itself as playing the traditional role of "the government's law firm," and although it is willing to provide "consultation" as to the form of proposed agreements, it has not attempted to establish any form of control nor to maintain a central registry of agreements in force. The role of the department of Justice can thus vary from actually drafting the complete agreement to being completely excluded from the drafting negotiations and the enforcement of such agreements. According to an officer of the department whom we interviewed, the important factor in determining whether the department will participate in the preparation of any given agreement is whether the legal work of the department involved is done by an officer of the department of Justice seconded to that department, or whether the legal work is done entirely by a legal officer of that department. Officers seconded to other departments will generally refer proposed agreements back to the department of Justice for information and for comments. Also, a number of departments prefer to refer drafts to the department of Justice, either as a matter of course or for advice on issues beyond the technical competence of departmental officers. In practice, according to the same officer, the most important agreements are brought to the attention of the department of Justice in one way or another, but it should be stressed that there is no firm procedure. When the department of Justice is involved in the drafting of a federal-provincial agreement, at least according to the officer interviewed, two factors are considered: a) the language of the agreement that is to be signed; and b) the language in which the drafting officer is most competent. The legal officer drafting the agreement may do so in either English or French. If he is preparing an agreement to be signed with provinces other than Quebec the agreement will almost certainly be prepared in English. Agreements with the province of Quebec which are to have signed texts in both languages are prepared in English and French before negotiations begin, and both texts are the subject of negotiation. However, unless the drafting officer is competent in French, the agreement is first drafted in English and then the French translation is made.⁵

E. Analysis of Replies to Questionnaire

11.06. In the following analysis of replies to our questionnaire it should be noted that since all federal-provincial agreements involving provinces other than Quebec have signed texts in English only, our interest has mainly centred on agreements involving the province of Quebec. Replies were received from 15 departments and six agencies. A number of other departments and agencies replied that they did not make federal-provincial agreements. Out of the 21 replying, 10 departments and one agency stated that they had agreements with Quebec in force at present. The specific replies can be summarized as follows.

1. Types of agreement in force

One agency and nine departments stated that they had federal-provincial agreements made pursuant to special enabling legislation. Ten departments had made agreements pursuant to authorization by Order-in-Council. Eight departments had made agreements by direct negotiation with provincial departments. Two departments had entered into minor agreements with the provinces. Altogether, there was a total of 905 federal-provincial agreements administered by these various departments and agencies.⁶

2. Provinces with which French agreements are made

One agency and the 10 departments replying all stated that the only province with which they signed federal-provincial agreements in the French language was Quebec.

3. Language used in signing agreements with Quebec

In reply to this question, one agency stated that both its agreements with Quebec had official signed versions in English and French. In connection with agreements passed under special federal enabling legislation, three departments stated that their agreements were in both languages, while one had agreements only in English and another only in French. As to agreements approved by Order-in-Council, only one department had agreements in both languages, two departments had agreements in French only, and one department had agreements in either French or English, avoiding bilingual texts. As for the third category, two departments declared that their agreements were in both languages, one that it used English only, one that it used French only, and one that its agreements were either in French only or in English only. One department also commented that subsidiary agreements negotiated directly with Quebec were either in English only or in French only. Altogether, out of 66 such agreements, 26 were in English only, 18 in French, and 12 in both languages.

The following comments on departmental practices in this regard are interesting.

The Department . . . administers a number of its policies in agreement with the province or provinces concerned. Except as indicated in the questionnaire the agreement takes the form of an exchange of correspondence, usually between Deputy

Ministers. In recent years it is the practice of the Department . . . to correspond with the Quebec Deputy Minister of . . . in the French language unless it is believed there could be some misinterpretation of what is intended.⁷

The current Composite Federal-Provincial . . . Agreement has not been executed with Quebec, pending the re-drafting of the terms of the Agreement in accordance with the "Established Programs (Interim Arrangements) Act." It is expected, however, that official texts in both French and English will be signed with Quebec. It is also expected that an Agreement . . . will shortly be executed in both languages.⁸

A working French translation was made of the 1964 Federal-Provincial . . . Agreement, which terminated on March 31, 1965. The English text was regarded as the governing one.

Whereas, in the past, our agreements with Quebec were made in both languages, they nevertheless took the form of 2 separate documents, both of which had the status of official texts. Starting with the agreements under the Established Programmes Act, we are signing only one piece of paper containing French and English columns. It is hoped to extend the application of this bilingual form to many future agreements.⁹

. . . the practice generally has been to prepare the agreements in English and then to prepare translations into French in order that the final execution can be in both languages which has been the case in many instances. Occasionally, where it appears expedient to do so, French translations have been prepared for the use of representatives of the Quebec Government during the discussion or negotiation stage. In only one instance, in our recollection, has an agreement with Quebec been drafted originally in French and then translated into English. In that case it was a composite document in which Canada contracted with the Quebec . . . Corporation and the Quebec Government contracted with the same Corporation, all in the same document. This is under the . . . Act. In that case, both the English and French versions were signed as originals.¹⁰

In the letter agreements with Quebec under the Established Programs (Interim Arrangements) Act, texts were prepared in English and French and they recited that the agreements were made in duplicate in both languages. Quebec has requested that only the French copy be signed but it is intended to ask Quebec whether it would be agreeable to signing a document drafted in both languages, with the French and English versions appearing on the left and right sides of the pages in the manner in which the Quebec Statutes are published. This suggestion, made by the Legal Adviser to this Department, is felt to be a step forward and preferable to having separate documents signed in English and French.¹¹

Noteworthy in the comments of the last two departments quoted is the practice initiated by one and contemplated by the other of signing a single bilingual text of an agreement.

4. Availability of French translations

With respect to agreements made pursuant to special enabling legislation, one department stated that translations were always available and one that they were not available. Two departments did not reply. Relating to agreements approved by Order-in-Council, one department stated that translations were always available and one that they were available sometimes. In connection with the agreements negotiated directly with Quebec, one department had such translations, one had them sometimes, and one had none.

5. Language of original draft

In reply to this question one agency stated that agreements which needed an official French version were sometimes drafted in English and sometimes in French. With respect to agreements made under enabling legislation, of five departments replying, four stated that the draft was always in English and one that the practice varied. Out of six departments replying to the question dealing with agreements made by Order-in-Council, five drafted the original version in English and one sometimes in English and sometimes in French. Two departments also added that all subsidiary agreements negotiated directly with Quebec were always drafted in English. It would appear that whenever the official text of a federal-provincial agreement is either bilingual or even in French only, the original draft of the agreement is almost inevitably in English and the French version is only a translation.

6. Validity in textual conflicts

One agency stated that it presumed that all their English and French versions were of equal validity but that they had never run into a conflict. None of the agreements entered into by the agency contained provisions dealing with the language of implementation of the agreements. Seven departments stated that their French and English texts were of equal validity when such bilingual texts existed. However, this is not borne out by their replies to the next subsidiary question dealing with conflicts between the two texts. Two departments stated that they would refer to the French version, one that it would refer to the original text (which, as we have seen, is almost always in English), and four stated that the problem had never arisen and that they did not know what they would do. One department said that it would refer the conflict to the department of Justice. All the departments replied that their agreements contained no provisions relating to the language in which the programme set up under the agreement was to be implemented.

7. Modification of agreements

All those replying to this question stated that in preparing a modifying agreement to a major federal-provincial agreement already signed, the same languages would be used in the official text or texts as in the original agreements.

8. Historical survey

Since question 8 does not seem to have been answered with the thoroughness desired the replies were not tabulated, and no extensive conclusions may be drawn from the replies received. One impression derived from perusing these replies is that of the agreements signed with Quebec, more are in French, or at least in both French and English, than was the case 10 years or more ago. It should also be added that during the course of interviews conducted in a number of departments, each department expressed complete willingness to sign agreements in French only with Quebec, which for many means a change from the existing practice.

F. Conclusions

11.07. The conclusions to be drawn from our study are self-evident. In practice the original drafts of all federal-provincial agreements, no matter what their ultimate language, are in English only. Secondly, when French is used, either alone or in bilingual texts, it is only with the province of Quebec. The other nine provinces have never signed a French text of federal-provincial agreements. In other words, it would appear that one text of federal-provincial agreements is signed by nine provinces in one language while another or both are signed by Quebec. This situation could give rise to a variety of conflicts. What would happen in the event of a disparity between the English texts signed by the other provinces and the French text signed by Quebec? Could an English-speaking province invoke the more favourable French version which it had not signed but which Quebec had? Or, conversely, could the federal government oppose to Quebec the English text which the other provinces had signed or which Quebec had signed together with a French version? While the problem does not appear to have arisen yet, it could easily occur. For juridical consistency it would be better if all provinces signed the same text or signed both versions when there is a bilingual text. On the other hand, it must be borne in mind that this method could present practical difficulties for English-speaking provinces if their legal and technical advisers do not understand French.

*A. Introduction**1. Forms of international agreements*

12.01. Lord McNair has defined a treaty as a “written agreement by which two or more states or international organizations create or intend to create a relation between themselves operating within the sphere of International Law.”¹ In fact, there are many forms of international agreements. The term *treaty* is often loosely applied to international agreements although such agreements can be signed in a plethora of forms and bear many names. For instance, the word *convention* generally refers to a multilateral agreement; a *declaration* generally means a statement of existing law; a *protocol* generally amends or supplements a treaty; the word *act* has been used to describe the establishment of a multilateral regime for a defined area; the words “final act” may be used to sum up the proceedings of an international conference; a *general act* is an instrument which enumerates several treaties; an *exchange of notes* is used for a great variety of less important agreements. Other words which are sometimes used to describe international agreements are: *accords*, *additional article*, *arrangement*, *venant*, *compromis*, *lettres reversaillies*, *modus vivendi*, *statute*, *charter*, *pact*, and *concordat*. Furthermore, although the almost universal practice is to record international agreements in writing, international law also recognizes oral agreements as binding. Also, while the classical treaty virtually always assumed the form of a contract (that is, of an agreement between two or more states), many modern international agreements now assume the form of international legislation, either by confirming existing international law or by creating new international law.

12.02. In the present chapter we shall examine all international agreements entered into by Canada up to the end of August 1965. These agreements have been divided into the following categories: a) multilateral treaties, which are defined as agreements made with two or more states or with international organizations; b) bilateral treaties, under

which heading are classified all agreements made with a single state irrespective of the nature or type of the agreement; and c) exchanges of notes. The last category includes all those listed as such in the "Canada Treaty Series" with the exception of the conventions on legal proceedings in civil or commercial matters, which were negotiated by Great Britain and extended to Canada by exchanges of notes.

2. Canadian treaty-making power

12.03. The constitutional and legal definition of the traditional treaty-making power of Canada was stated in an official memorandum of July 21, 1952, from the government of Canada to the United Nations:

1. Canada has very few statutory provisions relating to the exercise of the treaty-making power. The rules followed, so far as they can be ascertained, are for the most part founded on unwritten custom.

2. The Constitutional Authority to negotiate and conclude treaties is part of the Royal Prerogative, which in practice is exercised in the name of the Crown by the Governor-General in Council on the advice of the Secretary of State for External Affairs, who is responsible (under the Department of External Affairs Act, R.S.C. 1952, c.68) for the negotiation and conclusion of treaties and other international agreements.

3. There is no law imposing any obligation on the Government of Canada to refer treaties or other international agreements to the Parliament of Canada for approval prior to ratification. International obligations are entered into in many instances without reference to Parliament. The negotiation and conclusion of a treaty or other international agreement is an executive act.

4. Before the Government of Canada assumes an international obligation, two things must be considered. First, there is the question whether the provisions of the treaty or obligation accord with existing Canadian law and secondly whether any action proposed to be taken to implement the treaty is authorized by existing law. Entry into an international obligation or treaty, although binding on Canada internationally, does not give it force of law in Canada. Consequently the power of the Federal Government to implement the treaty frequently, though not always, requires domestic legislation to be passed by the Parliament of Canada or the Provinces, depending upon whether the subject matter is within federal or provincial jurisdiction according to the British North America Act.

5. The only other statutory provision in Canadian law referring to treaty-making powers is to be found in section 132 of the British North America Act, which reads as follows:

"The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries."

This section of Canada's Constitution has in recent years given rise to some difficulty, although, at the time the Canadian Constitution was drafted, it fulfilled our requirements because Canada did not normally negotiate or conclude its own treaties as it does to-day. Various judicial decisions since 1867, however, have developed a constitutional pattern which at present does not permit the Federal Parliament to implement certain types of treaties without concurrent legislative action on the part of the Canadian Provinces.

.....

7. Section 91 of the British North America Act gives the Parliament of Canada

exclusive jurisdiction to legislate in certain fields, while section 92 gives the Provinces exclusive jurisdiction to legislate in certain other fields, including property, civil rights and the administration of justice. Should the conclusion of, or accession to, a treaty by the Federal Government require implementation by changing the Provincial Statute Law, the Federal Parliament cannot effect such change without concurrent legislation on the part of the Provinces, if the subject matter lies wholly or partly within the legislative competence of the Provinces. . . .²

12.04. Normally, international agreements entered into by Canada are negotiated either at home or abroad by officers of the department of External Affairs. The manner of negotiation may take a variety of forms. It may be by a full-scale delegation sent specially to an international conference for that purpose or directly by the Canadian mission in the country involved. When the negotiations take place in Canada, they normally do so in Ottawa. The signing of bilateral agreements usually takes place in the capital of the country where the negotiations have been conducted, and the instruments of ratification, if required by the agreement, are exchanged in the capital of the other country. Multilateral agreements generally define the appropriate manner of signature and ratification, generally by reference to the depository state or organization. Except for special cases, no permission is needed in order to begin negotiations. However, approval by Order-in-Council is always required before an agreement can be signed. Once such authorization has been given by the cabinet, the Legal division of the department of External Affairs prepares the actual instrument of ratification which is to be signed by the Secretary of State for External Affairs.

3. Role of the department of External Affairs

12.05. The Legal division of the department of External Affairs does not confine its role to final draftsmanship. It is often involved in the actual negotiation of a great many treaties. Section 318 of the Manual of Regulations and Instructions of the department of External Affairs requires that the Legal division should be consulted at the earliest possible stage of negotiations both as to the treaty's form and as to its legal substance. When an agreement is being negotiated in Ottawa, an officer of the Legal division will be assigned to the meetings whenever possible. When negotiations take place abroad, and the matter is of sufficient importance, a legal officer may be added to the Canadian delegation. It should be noted, however, that fully one-third of all the officers of the department of External Affairs are trained lawyers. The Legal division itself, however, does not have more than 20 officers at any time. Its responsibility is to ensure that agreements conform to international law as to both form and practice and that they are consonant with previous agreements to which Canada is a party. It is mandatory that the Legal division approve the final draft of a treaty. The division is also required to decide whether the preliminary recital and formal section of the proposed agreement respect accepted practice, whether the type of agreement is suitable under the circumstances, and whether Canadian treaty practice has been followed. The Legal division is further required to check the draft for any possible constitutional conflicts or infringements of provincial rights. Finally, it must determine what form of implementing legislation may be necessary at both the federal and provincial levels.

12.06. The signature of an international agreement by the Secretary of State for External Affairs or by any other authorized Canadian representative must often be followed by parliamentary implementation.³ The courts will not enforce the provisions of an international agreement or treaty which alters the rights of citizens unless the substance of the treaty has been ratified by enabling legislation. If the subject-matter of the agreement falls within federal jurisdiction exclusively, such legislation is passed by Parliament. If subject-matter falling within provincial jurisdiction is affected, provincial ratification is also necessary.⁴

4. *The languages of international law*

12.07. International law permits a very wide latitude in the choice of language or languages of international agreements. The general rule—the reasons of which are obvious—is that whenever possible the language of the treaty is that of the country signing. But this rule can seldom be observed in practice except when all the signatories have the same language. Furthermore, even a perfunctory study of international agreements discloses that several languages, either because of their prestige or their importance, seem to take precedence over others. Historically, Latin was the language of international communications during the middle ages; for a short time in the seventeenth century, Italian and Spanish assumed the same role; in the eighteenth and nineteenth centuries French dominated European diplomatic affairs. The hegemony of French has been challenged in the twentieth century by English. The role of these so-called diplomatic languages is particularly significant in multilateral agreements, which may be signed by a great many countries speaking a variety of languages. While bilateral agreements between countries speaking different languages may be drafted in the language of each country without too much difficulty, such multiplicity of languages is naturally impossible for most multilateral agreements. Recourse is then had to the so-called diplomatic languages. The majority of multilateral treaties are thus drawn up in several languages. For instance, it is common for most United Nations treaties to be drawn in the five official languages of the organization: English, French, Spanish, Russian, and Chinese.

12.08. The situation is further complicated for bilingual or multilingual countries such as Canada, Switzerland, Belgium, Finland, and the Cameroons. International law does not provide any rule governing the use of second or third languages in international agreements. The matter is left to the discretion of the governments involved which must decide what language or languages they will use for the agreements into which they will enter. Nothing stops a country, unilingual or multilingual, from entering into agreements drawn up solely in a foreign language. Since this is a matter of executive discretion, which will indicate the extent of a government's determination to use a particular language, a substantial part of the present chapter will be devoted to the study of French and English in agreements entered into by Canada.

12.09. The department of External Affairs has only one rule concerning the use of languages in international agreements: when Canada signs a treaty, at least one official text must be in either English or French. This rule has been broken only once—in a series of exchanges of notes with Venezuela during the years 1958 to 1960. We have been

unable to find any other rule either in the *Manual of Regulations* or in the course of interviews with members of the Legal division. A departmental memorandum entitled "Canada Treaty Procedures" states, "Bilateral agreements are usually drawn up in either of Canada's official languages as well as the language of the other party."⁵ The same rule seems to apply to multilateral agreements, which Canada requires to be signed in at least one of its official languages. The department does not seem to require that either bilateral or multilateral agreements be signed in both of Canada's official languages. With exchanges of notes the problem is slightly different. Indeed, the notes by either country involved in the exchange will be in only one language. The general practice in international law is for each country to use its own language when exchanging notes. The only departmental rule we have been able to ascertain in connection with the exchange of notes is that Canada will send notes in only one of its two official languages. Since the department of External Affairs has a much greater discretion as to the choice of languages in exchanges of notes than in other forms of agreement, its choice in this area will be more instructive, and consequently we have paid much attention to it.

5. *The Canada Treaty Series*

12.10. Canada signed its first treaty in 1923. It was not until 1931, however, under the Statute of Westminster, that Canada acquired full competence to direct its external affairs. However, Canada appears to have been in virtual control of her external affairs as early as 1928. All international agreements signed by Canada (bilateral and multilateral treaties and exchanges of notes) are published in the "Canada Treaty Series" ("Recueil des traités canadiens"), which begins in 1928 and contains Canadian treaties going back to 1926.⁶ The series is published in annual volumes. All agreements are first issued in pamphlet form and numbered consecutively. They are then bound up into the annual volume. The Canada Evidence Act provides that evidence of a treaty binding upon Canada may be made merely by the production of a copy purporting to be printed by the Queen's Printer for Canada.⁷ Obviously, the text published in the series is such evidence. The series has been fully bilingual since 1951 only. English and French texts do not appear on opposite pages, except for those of bilateral agreements or exchanges of notes where a language other than French or English is used by a foreign country. For these the English or French version will appear on a third page since the two official texts are on opposite pages. It is clear that care has been taken, at least since 1951, to assure that texts of Canadian international agreements are available in both French and English. Some form of bilingualism existed in the series even earlier than 1951. Indeed, the series has been totally bilingual since 1951 in the sense that both the French and English copies of all Canadian treaties have been bound into the annual volume. Since 1928, French copies or translations of all Canadian treaties have been made, but they were not incorporated in the series. Before 1941 no French texts were published in the series at all unless they were the texts of treaties in French only, in which case an English translation was also published. Between 1941 and 1949 some French translations were published in the series but not in a systematic fashion, and their number is insufficient to make it possible to say that the French text is always available.

12.11. The purpose of this chapter is to examine every international agreement, as defined above, entered into by Canada, in order to determine what languages have been used and more particularly the extent to which Canada's two official languages have been employed in conducting the external affairs of the country. The legal consequences of Canadian linguistic practices will also be examined. Finally, these agreements have been analyzed with a view to establishing the extent to which they modify, affect, or implement the use of Canada's two languages.

12.12. We stress that this is not a study of Canadian foreign policy nor an examination of the functioning of the department of External Affairs. The study is confined strictly to the languages used by Canada in her external affairs. It is essentially statistical, but the statistics should be read against the background of the realities of Canadian external affairs, which are conducted to a large extent with the United States and English-speaking Commonwealth countries.

12.13. Although the present study⁸ has been supplemented by a certain number of interviews and by consultation of documents and textbooks, the emphasis has been on the "Canada Treaty Series" itself. A complete review of the series has been made from its first publication in 1928 up to the latest available published text of August 1965. Each agreement has been examined with a view to determining what are the languages of its official texts, what are the languages into which it has been translated, and whether it contains any substantive provision affecting matters of language or biculturalism in Canada. It is customary in multilateral and bilateral agreements to state before the signatures what are the languages of the official texts thereof. In the nineteenth and early twentieth centuries it was not at all uncommon for a distinction to be made, when several languages were used, between "official" and "authentic" texts and also to employ the device of official translations. The use of official translations has become fairly rare, but the practice of stating in the agreement itself which texts have equal authenticity at international law has become increasingly common. We have limited our study to texts having authentic legal value rather than concerning ourselves with "official translation." In any case, the "Canada Treaty Series" does not disclose whether translations exist or not. With exchanges of notes the reading of the note itself discloses the language used, since all notes are sent either in French or English and never in both languages. Where the "Canada Treaty Series" uses an unofficial translation, its status is indicated by placing the word *translation* between brackets.

B. Survey of International Agreements Affecting Canada or Signed by Canada

12.14. We have noted that Canada began to sign international agreements itself in the middle 1920s. Prior to that all treaties affecting Canada were made by the United Kingdom government or by its agencies in Canada with the sanction of London.⁹ In 1927 the Queen's Printer published a work entitled *Treaties and Agreements Affecting Canada in Force between His Majesty and the United States of America, 1814-1925*. This work contained information similar to that in the "Canada Treaty Series," at least so far as language is concerned. Between 1814 and 1925, 66 treaties were signed. Of these, 19 were multilateral. Fifteen of these multilateral agreements were in French, although

frequently an official English translation was appended. The remaining four were in English only. The 45 other treaties were all in English only. The fact that such a large proportion of the multilateral agreements were in French is obviously a reflection of the hegemony of French in diplomatic affairs during the nineteenth and early twentieth centuries. The use of French during the period prior to 1925 was certainly not due to any desire to reflect in Canada's international affairs the official bilingual structure of the country. Indeed, in bilateral agreements and in the exchanges of notes, where some latitude existed, the only language used was English—even with France!

12.15. The first three genuinely Canadian treaties were the Halibut Treaty of 1923, the Boundary Demarcation Treaty of 1925, and the Lake of the Woods Treaty of 1925. Although they were all signed by a French Canadian, Ernest Lapointe, they were all in English.

12.16. For the purposes of our study we can consider that Canadian diplomatic activity really began in 1928. The great bulk of Canada's diplomatic exchanges have been with the United States and Western Europe. Undoubtedly the greatest number of notes and bilateral agreements are with the United States. Next comes the United Kingdom. The majority of agreements made with continental European countries have been with France, Spain, Germany, and Italy, besides some Eastern European countries. Although many agreements involved English-speaking Commonwealth countries, it must be noted that a good deal of diplomatic activity took place with countries in continental Europe or in South America where, at least until recently, French was as much a second language as English.

C. Statistical Analysis

12.17. The tables and statistics contained in the present section are based on five-year periods in order to provide a statistically significant number large enough to serve as a basis for comparison with other types and periods.

1. Bilateral treaties

12.18. Of the 17 bilateral treaties signed by Canada between 1928 and 1932, seven were in English only and one in French; five had both official English and French texts; and the remaining four were signed in English and in a foreign language. Between 1933 and 1937, 37 agreements were signed, of which 15 were in English only and none in French only; three were in both English and French; 17 were in English and in another language; and two were entirely in a foreign language. Of the 27 agreements entered into from 1938 to 1942, 15 were in English only, none was in French only, one was in both English and French, and 11 were in English and a second language. Canada entered into 52 bilateral treaties from 1943 to 1947, of which 41 were in English only and none in French only; three were in both English and French; and eight were in English and a foreign language.

Out of 27 bilateral agreements entered into from 1948 to 1952, 20 were in English

only, one in French only, four in both English and French, and the remaining two in English and a second language. From 1953 to 1957, out of 30 agreements, 16 were in English only, one in French only, two in both French and English, one in English, French and German, and 10 in English and a foreign language. From 1958 to 1962, out of 27 agreements, 17 were in English only, none in French only, three in both languages, and seven in English and another language. From 1963 to August 21, 1965, out of 22 treaties signed by Canada, seven were in English only, none in French only, one in both French and English, and 14 in English and a foreign language.

The most salient features of the foregoing analysis of bilateral agreements signed by Canada during the previous four decades are the large number of treaties signed only in English and the almost total absence of agreements signed either exclusively in French or in French and a second language. It is significant that whenever Canada has signed a bilateral agreement with another country and the language of that country as well as one of Canada's official languages have been used, the language used by Canada has been English.

2. Multilateral agreements

12.19. From 1928 to 1932 Canada was a party to 22 multilateral treaties of which four were in English only, five were in French only, 11 were in both English and French, and two were in English and another language. From 1933 to 1937 Canada entered into 16 multilateral treaties, of which three were in English only, four were in French only, seven were in English and French, one was in Spanish only, and one was in English, French, and German. Of the 17 agreements signed from 1938 to 1942, five were in English only, two in French only, seven in both English and French, and three in English, French, and one or two other languages. Canada signed 57 multilateral agreements between 1943 and 1947, of which 15 were in English, two in French, 23 in both English and French, 10 in English, French and other languages, and seven in English and other languages. Of the 43 agreements covered from 1948 to 1952, five were in English, three in French, 22 in both English and French, 11 in English, French and other languages, one in English and another language, and one in French and another language.

From 1953 to 1957 Canada signed 45 multilateral agreements, of which five were in English only, but none in French only. Sixteen agreements were in both English and French. Of the remainder, 15 were in English, French, and other languages, eight were in English and a language other than French, and one was in French and another language. From 1958 to 1962, out of 21 agreements, five were in English only, one was in French only, and three were in English and French. Of the remainder, six were in English, French, and one or more other languages, five were in English and languages other than French, and one was in French and another language. Through the period from 1963 to August 21, 1965, Canada signed seven multilateral agreements of which two were in English only, none in French only, and one in both English and French. Two agreements were signed in English, French, and other languages, and two in English and other languages.

A large proportion of the multilateral agreements entered into by Canada are in both

English and French. Multilateral agreements in English only are relatively rare and those in French only represent a negligible quantity. The large number of agreements in which both French and English are official, either alone or with other languages, should not be taken as being too significant for the purposes of our study since Canada may have little choice in selecting the language of multilateral agreements, an increasing number of which are drafted as a matter of course in the five official languages of the United Nations. The figures for bilateral agreements and exchanges of notes will obviously give a much more faithful reflection of the actual practices of the department of External Affairs.

3. Exchanges of notes

12.20. In the following analysis of the languages used by Canada in sending notes to other countries, the same statistical methods have been used as in connection with bilateral and multilateral agreements. However, a distinction has been made to identify the exchanges with France, Switzerland, and Belgium which, for the purposes of our study, have been deemed to be either totally or mainly French-speaking countries. On only five occasions has a language other than French or English been used in exchanges of notes. These notes were all in Spanish and were all sent to Venezuela. Of the 30 notes sent from 1928 to 1932, all but the two sent to France were in English. From 1933 to 1937, of the 31 notes sent by Canada, all but the single one sent to France were in English. From 1938 to 1942, Canada exchanged 55 notes, and all except the one with France were in English.

During the period from 1943 to 1947, Canada exchanged 85 notes. Of these, seven went to French-speaking countries, but only three of these seven were in French, and one was in both French and English. The other three, together with all 78 notes exchanged with non-French-speaking countries, were in English. During the period from 1948 to 1952, Canada issued 87 notes, of which five went to French-speaking countries. Of these five, one was in English, one was in both English and French, and three were in French, although it should be noted that these three French notes were, in fact, sent in both English and French, since they also went to a number of countries besides France. The French-speaking countries received the French version and the other countries received the English version. Of the remaining 82 notes going to non-French-speaking countries, 79 were in English and three were in French. Canada exchanged 68 notes during the period from 1953 to 1957, four of which went to French-speaking countries. Of these four, two were entirely in English, one was in French, and one was in both English and French. Of the remaining 64 notes, 63 were in English and one was in Spanish. Of the 70 notes exchanged from 1958 to 1962, four went to French-speaking countries and all four were in French. Of the remaining 66 notes, 61 were in English, one was in French, and four were in Spanish. From 1963 to the end of 1965, Canada issued 37 notes, all of which were in English, even though one went to a French-speaking country and two were accompanied by a French translation.

It is evident that when the department of External Affairs has discretion as to the choice of language, as it normally does in the exchange of notes, it almost always uses English and practically never French. Even in dealing with French-speaking countries, it is not unusual for the department to send its notes in English.

12.21. It would appear that French is used in bilateral agreements only when the other country is French-speaking. In multilateral agreements there is a higher proportion of French, which might be due to a variety of factors including the fact that French-speaking countries are involved and that all United Nations agreements tend to be in the five official languages of the organization. Exchanges of notes, to all intents and purposes, are always in English except when made with French-speaking countries, although even then a substantial number of them are in English.

Table XII.1. Proportion of French texts in agreements to which Canada was a party, 1928-65

Type of agreement	No. of agreements with at least one text in French	Total no. of agreements	French texts as percentage of total no. of agreements
Bilateral agreements	25	239	10.4
Multilateral agreements	162	228	71.0
Exchanges of notes	22	463	4.7
Total	209	930	22.5

12.22. It appears that only 22.5 per cent of all international agreements entered into by Canada have French as one of their official languages (*see* Table XII.1). This percentage would be much lower if it did not include multilateral agreements, of which 71 per cent have a French version—a proportion which is relatively high but which reflects the realities of international diplomacy more than Canadian policies. Indeed, where the department of External Affairs appears to have a much wider latitude, namely in signing bilateral agreements and in exchanging notes, the percentages sink respectively to 10.4 per cent for bilateral treaties, and 4.7 per cent for exchanges of notes.

The foregoing statistical analysis is based almost entirely upon the texts published in the "Canada Treaty Series." It has involved only mathematical computations and does not represent a study of policies motivating the choice of language by the department of External Affairs. Nor has any attempt been made to determine the practical considerations, if any, explaining the choice of language in any particular case. However, we believe that, even with these reservations, the statistical analysis of the 930 international agreements entered into by Canada since the beginning of 1928 and up to and including the end of 1965, leads to a number of clear and inescapable conclusions. The obvious one is the almost complete predominance of English as the exclusive language in which Canada conducts its international affairs. We have seen that notes sent by Canada to other countries are almost always in either French or English. The choice lies with the department of External Affairs. Of the 463 notes exchanged during this period by Canada, only 22 (or 4.7 per cent) were in French. During the same period Canada signed 239 bilateral agreements, of which only 25 (or 10.4 per cent) had an official text in French. Even then,

many of these 25 were in English as well as in French. It is true that the situation is quite different as far as multilateral agreements are concerned and that out of a total of 208, 162 (or 71 per cent) had a French version. But we have seen that the language of multilateral agreements need not necessarily reflect Canadian linguistic policies and probably seldom does. On the one hand, even a perfunctory perusal of the "Canada Treaty Series" discloses that a great many of Canada's international agreements are made with English-speaking countries such as the United States and the United Kingdom (roughly 30 per cent) and many with English-speaking countries in the Commonwealth; on the other hand, many treaties are entered into with countries to which the use of French is no more alien than is that of English. The fact is that Canada practically never uses French except when it deals with French-speaking countries such as France, Switzerland, and Belgium. In all other cases, English is used. Still, attention should be drawn to the Automotive Agreement signed with the United States in 1965¹⁰ as the first bilingual bilateral agreement entered into by Canada with the United States—or with any English-speaking country, for that matter.

4. *Comparison with Quebec practices*

12.23. In order to provide a background against which to judge the linguistic practices of the federal government in negotiating international agreements, we believe that it would be instructive to compare them with those of Quebec. While we were unable to conduct a systematic survey of all Quebec agreements for a number of practical reasons, it would appear, from the fragmentary information available to us, that usually when Quebec has dealt with an English-speaking jurisdiction, its agreements have been in English only. For instance, five agreements have been entered into under the Quebec Succession Duties Act (with Northern Ireland,¹¹ Great Britain,¹² Trinidad and Tobago,¹³ Ontario,¹⁴ and British Columbia¹⁵). All were negotiated in English according to advice received from Quebec officials. We were also informed by the Clerk of the Executive Council¹⁶ that when agreements are entered into with English-speaking governments, such as London or Washington, English is used and only the English version is official. An unofficial French "office translation" is prepared for the government's own file but is not authentic. On the other hand, agreements with French-speaking countries tend to be in French.

D. *Interpretation of International Instruments*

1. *Canons of interpretation*

12.24. Treaties and other instruments concluded among nations are subject to canons of interpretation not unlike those applied by the courts to the interpretation of statutes, contracts, wills, and other legal instruments.¹⁷ However, variations of certain of the ordinary rules of interpretation are necessitated by the wider purposes and the peculiar nature of agreements possessing international character and scope. Some of the better-

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force.” In a case where neither Part I nor Part XIII was in question, the court held that all three texts must be considered together, and only when the result of this process reveals a divergence should the court adopt the text declared in the treaty to prevail.²⁸

h) When none of the ordinary canons of interpretation solves problems in cases of discrepancy, ambiguity, or the like, the spirit of the treaty should determine the interpretation to be given to it.²⁹

i) One author has suggested yet another solution to the problems created by discrepancies in treaties: “Unless the contrary is expressly provided, if a treaty is concluded in two languages, and there is a discrepancy in the meaning of the two different texts, each party is only bound by the text of its own language. Moreover, a party cannot claim the benefit of the text in the language of the other party.”³⁰

12.26. It seems to be the practice now to provide that all the texts of multilingual treaties are equally authentic.³¹

12.27. A treaty, in order to become enforceable, must be implemented by statute, either federal or provincial, depending upon which jurisdiction the treaty's subject-matter falls under pursuant to sections 91 and 92 of the British North America Act. All acts of Parliament are bilingual. The question arises: if a treaty in only one language is entered into by Canada, what is the status of the translation made by Parliament, particularly if it conflicts with the official international text? The same would apply to Quebec, whose statutes are all bilingual, if it entered into an international agreement in only one language. These problems have never been considered. We venture the opinion that the original text should prevail.

E. Provisions in International Agreements Affecting Linguistic Rights within Canada

12.28. All international agreements and exchanges of notes contained in the “Canada Treaty Series” have been examined with a view to determining whether their substantive content as distinguished from the language in which they are drawn affects the linguistic rights of Canadians directly or indirectly. In making this survey no systematic attempt was made to examine the official languages of several international organizations to which Canada is committed. We know that the 1924 Universal Postal Convention,³² which organized the Universal Postal Union, stipulates that the official language for all documents in the international bureau of the Postal Union is French. Many provisions can also be found about the administrative languages of international organizations or the languages for international conferences. The Geneva Convention on War Prisoners lays down certain rules as to language in prison camps.³³ The Geneva Convention relative to the Protection of Civil Persons in time of War, August 12, 1949, which is approved by the Geneva Conventions Act³⁴ stipulates in article 99 that

The text of the present Convention and the texts of special agreements concluded under the said Convention shall be posted inside the place of internment, in a language which the internees understand, or shall be in the possession of the Internee Committee.

Regulations, orders, notices and publications of every kind shall be communicated to the internees and posted inside the places of internment, in a language which they understand.

Every order and command addressed to internees individually must likewise be given in a language which they understand.

Other agreements, such as the Fur Seal Convention of 1957,³⁵ commit Canada to the use of certain languages in certifying officers working under the auspices of the treaty. However, the bulk of relevant provisions in Canadian international agreements are those dealing with the transmittal of legal proceedings in civil and commercial matters from one country to another.

12.29. In 1928, by exchange of notes, Canada extended to itself the treaty between the United Kingdom and France respecting legal proceedings in civil and commercial matters.³⁶ Section 3 of the agreement, referring to service abroad, states:

(b) The request is drawn up in the language of the authority applied to. It contains the name of the authority from whom the document enclosed emanates, the names and descriptions of the parties, and the address of the recipient. It is accompanied by the original and two copies of the document in question in the language of the State making the request, and by a translation certificate by the consular authority of that State, and a copy of such translation.

(c) The service is effected by the delivery of the original or a copy of the document, as indicated in the request, and the copy of the translation, to the recipient in person, in England, by a process server; in France, by a "huissier" appointed by the "Procureur de la République."

In connection with rogatory commissions, section 6(c) thereof states: "(c) The commission rogatoire is drawn up in the language of the authority making the request and accompanied by a translation in the language of the authority applied to." This agreement obviously became the prototype of many similar agreements entered into by Canada by means of exchanges of notes. For instance, in 1935 an exchange of notes with Germany³⁷ provided that communications with Canadian provincial authorities should be in English except in Quebec where they may be in either English or French. Requests for service in Germany would have to be drawn up in German. Sometimes provision is made for an official translation into the official language or languages of a document to be served in another country.³⁸

12.30. Apart from the foregoing provisions, very little appears in international agreements entered into by Canada which might affect the linguistic rights or duties of Canadians.

A. Introduction

13.01. The purpose of this concluding chapter is to try to determine the general official status of French and English in the various Canadian jurisdictions, whether federal, provincial, or territorial. On the basis of our findings as presented in the previous chapters, and other pertinent provisions of law which will be referred to, we shall endeavour to establish the extent to which French or English, or both, possess an official status in any given jurisdiction. However, official status must not be confused with standing in practice. As we know from experience and have had occasion to note in this report, a language can be officially recognized but be ignored or neglected in practice. Or *vice versa*, a language, without possessing a defined juridical status, might be used in official activities to the extent of acquiring *de facto* a type of official status. This chapter is concerned mainly with juridical or theoretical rather than effective or practical status, although obviously the two overlap.

13.02. The term "official language" has been used frequently in this report and is current in legal and political discussions of the language question in Canada. To our knowledge, it has never been properly defined. We ourselves have used the following working definition: an official language is a language in which all or some of the public affairs of a particular jurisdiction are, or can be, conducted, either by law or custom. We take public affairs to comprise the parliamentary and legislative process, administrative regulations, the rendering of justice, all quasi-judicial activities, and the overall day-to-day administration. We have surveyed many of these fields at length in this report, but several important areas that are germane to our project, such as education, the Civil Service, and the Supreme Court, have been left out because they formed the object of separate inquiries. In brief, we consider an official language to be the language in which laws are passed, cases can be pleaded and argued, and the government and the citizenry deal with one another. In Canada such description, depending, of course, on the jurisdiction, can fit only French and English.

13.03. In Chapter II we demonstrated that there is a constitutional vacuum in Canada with respect to jurisdiction over languages. Although no doubt exists as to the respective powers of Parliament and of the provincial legislatures to deal with the ancillary linguistic aspects of any subject matter on which they are entitled to legislate,¹ jurisdiction over the substantive and cultural aspects of language is not clearly attributed anywhere in the constitution.² In fact, subject to the narrow exceptions of section 133 of the British North America Act, both Parliament and the provinces can deal with languages almost at will.³ Consequently, only by examining the laws and practices of each jurisdiction individually can we determine what official status it grants to English or French. This is the precise aim of the present chapter.

B. Within the Federal Jurisdiction

13.04. The only provisions of the B.N.A. Act which impose language requirements at the federal level are found in section 133 which, as we have seen,⁴ states that either language can be used in the debates of Parliament, that the records and journals of Parliament shall be bilingual, and that all statutes must be published in both languages. Furthermore, all pleadings and processes in the courts of Canada can be in either French or English. The very limited scope of these provisions has been analyzed in an earlier chapter.⁵ We shall now review how Parliament and the federal government have dealt with languages.

1. The parliamentary and legislative process

13.05. We have noted how Parliament carries out the duty imposed upon it by section 133 of the B.N.A. Act to legislate in both languages.⁶ Despite some practical shortcomings, all federal statutes are proposed, adopted, and published in both French and English. This respect for bilingualism is also reflected in a number of Standing Orders of Parliament:

a) The prayers read by the Speaker before the beginning of each daily session are in English or French on alternate days, at least if the Speaker is conversant with both languages.⁷

b) Standing Order no. 43 directs that "All motions shall be in writing, and seconded, before being debated or put from the Chair. When a motion is seconded, it shall be read in English and in French by Mr. Speaker, if he be familiar with both languages; if not, Mr. Speaker shall read the motion in one language and direct the Clerk at the Table to read it in the other, before debate";⁸

c) Standing Order no. 52 provides that the member elected to serve as Deputy Speaker and Chairman of Committee shall be required to possess "the full and practical knowledge of the official language which is not that of Mr. Speaker for the time being";⁹

d) Standing Order no. 74 states that "All bills shall be printed before the second reading in the English and French languages."¹⁰

2. *Subordinate legislation*

13.06. We concluded in our study of federal subordinate legislation¹¹ that the bulk of the federal regulations are issued almost simultaneously in both languages, although they are almost uniformly drafted entirely in English and then translated.¹² We also noted¹³ that there is no constitutional requirement that subordinate or administrative law be bilingual. Bilingual publication is thus the result of voluntary practice or always amendable federal legislation.

3. *The courts*

13.07. The courts of Canada in which section 133 of the B.N.A. Act allows all pleadings and processes to be in either language have been enumerated in Chapter IV.¹⁴ They are the Supreme Court, the Exchequer Court (which also exercises the jurisdiction of the Court of Admiralty and the Prize Court), courts martial and military courts, the Senate Divorce Commission, possibly provincial courts which are designated as federal courts, and the courts in the Northwest Territories and the Yukon. On the other hand, the extent to which the words "pleading or process" make all proceedings in these courts bilingual is not clear.¹⁵ Both the Canadian Bill of Rights and a considerable number of federal statutes and regulations recognize the right to interpreters.¹⁶ The Criminal Code further provides for mixed or bilingual juries in Quebec and Manitoba.¹⁷

4. *Quasi-judicial boards and tribunals*

13.08. We have explained that the growing number of federal boards and commissions exercising quasi-judicial powers at the federal level are also not governed by section 133 of the B.N.A. Act¹⁸ and that the very limited bilingualism they practise is based on custom rather than on legal requirement. Our inquiry left no doubt, however, that most federal boards and commissions recognize the right of any party to proceed in French although this recognition entails very few practical effects. In practice, the great bulk of their proceedings is entirely in English.

5. *Administration of public affairs*

13.09. On February 20, 1967 the House of Commons approved an Act respecting employment in the Public Service of Canada,¹⁹ section 16 whereof provides for the Public Service Commission to receive applications from candidates for employment in the Public Service and to investigate, test, and examine them. Section 16(2) provides: "An examination, test or interview under this section shall be conducted in the English or French language or both at the option of the candidate except where an examination test or interview is conducted for the purpose of determining the qualifications of the candidate in the knowledge and use of either or both of these languages."

Section 20 gives the Commission discretion to determine the linguistic qualifications required to serve in the Public Service: "Employees appointed to serve in any department

or other portion of the Public Service, or part thereof, shall be qualified in the knowledge and use of the English or French language or both, to the extent that the Commission deems necessary in order that the functions of such department, portion or part can be performed adequately and effective service can be provided to the public.”

Pursuant to this statute Public Service Employment Regulations were issued.²⁰ Section 4(1) of the Regulations provides for the taking of appropriate steps to ensure that employees be available who are sufficiently proficient in the English or French language or in both, as the case may be, to achieve the following objectives:

a) where forty per cent or more but less than sixty per cent of the public served by the unit have the English language or the French language, as the case may be, as their mother tongue, every employee in the unit shall be sufficiently proficient in both those languages to permit the functions of the unit to be performed adequately and effective service to be provided to the public so served;

b) where ten per cent or more but less than forty per cent of the public served by the unit have the English language or the French language, as the case may be, as their mother tongue, the minimum number of employees in the unit who are sufficiently proficient in both those languages to permit the functions of the unit to be performed adequately and effective service to be provided to the public shall be such that in the aggregate the number is in the same proportion to the total number of persons on the staff of the unit as the said percentage is of the total number of persons comprising the public so served; and

c) every employee who is in a position that requires the performance of duties of a supervisory nature shall be sufficiently proficient in the English language or in the French language or in both languages, as the case may be, as will permit effective direction to be given to the persons supervised.

Section 5(2) determines which criteria the responsible staffing officer shall consider to establish the degree of ability required:

- a) to understand the language or languages, as the case may be, when spoken,
- b) to speak the language or languages, as the case may be,
- c) to read the language or languages, as the case may be, and
- d) to write the language or languages, as the case may be.

The regulations also contain detailed provisions as to the processes and areas of selection. Section 14(2) requires *inter alia* that every notice of a proposed competition where linguistic proficiency in accordance with the regulations is a factor, indicate this requirement as well as the degree of proficiency required or desired. The regulations also deal with the language of competition notices,²¹ and with the linguistic qualifications of the selection or appraisal board conducting examinations, tests, or interviews of candidates.²²

Furthermore, we have had occasion to point out a fairly large number of federal statutes or regulations dealing with public notices, signs, and labels to be given or exhibited to the public by the authorities or by certain individuals and corporations.²³ Many of these require the use of French, at least when they are used in the province of Quebec. Official forms and returns can normally be made in either language.²⁴ French and English also seem to be treated almost equally when there are linguistic requirements for official,

professional, or private employment.²⁵ We found similar situations in the linguistic regulations of private activities²⁶ and in the use of corporate names.²⁷

Additional evidence of the nearly equal official status of English and French in federal law can be found in a number of other statutes and in federal subordinate legislation. For instance, the Bank of Canada Act²⁸ requires Canadian bank notes to be printed in both English and French. The Canadian Citizenship Act²⁹ requires applicants for citizenship to have "an adequate knowledge of either the English or the French language, or, if [they have] not such an adequate knowledge [to have] resided continuously in Canada for more than twenty years." No cases have been officially reported interpreting what constitutes "an adequate knowledge of either the English or the French language," but in reply to our inquiry, we were advised by an official of the department of Citizenship and Immigration, in a letter dated August 26, 1965, that

... the Department takes the position that the expression "adequate knowledge" should be interpreted to mean that the knowledge of the language ought to be adequate to the needs of the applicant in the normal course of his life but that lack of any knowledge of a language could not amount to an adequate knowledge. In other words, the Department is of the view that the applicant should have some knowledge of the English or French language with the degree of facility and fluency required, depending upon such factors as the age, sex, education, and occupation of the particular applicant.

But applicants are naturally not obliged to know either language if they have resided in Canada for 20 years and they are in fact allowed to apply for citizenship in a language other than French or English. Section 4 of the Citizenship Regulations³⁰ requires the Clerk of the Citizenship Court to assist an applicant in completing the application form. This was intended to eliminate the need for applications in a language other than English or French. We are informed that a French-speaking applicant may apply for citizenship in his mother tongue in any citizenship court, anywhere in Canada. In other words, an immigrant could apply for citizenship in French even though the court was situated in British Columbia or the Atlantic provinces. The application form is standard and the English and French texts are combined in one document. A French-speaking applicant before an English-speaking court is normally requested to provide an interpreter, and when the court does not have its own interpreter, the costs of interpretation are normally borne by the applicant. In reply to our inquiry as to the ability of a unilingual English judge to determine the adequacy of an applicant's knowledge of the French language, and conversely, we were informed that

There is no set test that Judges are required to apply to determine the adequacy of an applicant's knowledge of the English or French language. This is left up to the Judge in question to determine. As a practical matter, most of the Judges that have been appointed as such under the Act have at least some knowledge of French and it has apparently never been felt to be a problem by any of them to determine the adequacy of an applicant's knowledge of one language or the other. As to the County and District Court Judges, of course, we have no knowledge of the extent of their understanding of both languages, and it is expected that a French applicant who appeared before a unilingual English Judge would provide his own interpreter, at his own cost, if he could not get along in English. If there were any serious doubt whether the interpreter was adequately translating the language of the Judge into

that of the applicant and vice-versa, it is probable that the Court would supply its own interpreter, and at the cost of the Citizenship Registration Branch. This problem has never, in the memory of any of our officials, arisen.

Certificates of citizenship are bilingual in one form. The oath of allegiance may be taken in either French or English anywhere in Canada. If, in the opinion of the court, an interpreter is necessary in order to administer the oath of allegiance, it would be up to the applicant to provide such an interpreter when the court does not have its own.

We also draw attention to other relevant federal statutes. For instance, chapter V of the fourth schedule of the Canada Shipping Act³¹ states that danger messages "may be transmitted either in plain language (preferably English) or by means of the International Code of Signals." The Food and Agriculture Organization of the United Nations Act provides that pending the adoption by the Conference of any rules regarding languages "the business of the Conference shall be transacted in English."³² On the other hand, the Copyright Act³³ in its second schedule refers to the Revised Berne Convention, article 21 of which states that the official language of the Office of the International Union for the Protection of Literary and Artistic Works shall be in French. Under the Visiting Forces (North Atlantic Treaty) Act, among the documents required in respect of members of a force, there is the "individual or collective movement order, in the language of the sending state and in the English and French language."³⁴

Evidence that French and English are treated as equal official languages is to be found also in federal regulations dealing with broadcasting and television. The Radio (A.M.) Broadcasting Regulations state:

Foreign Language Broadcasts

17. (1) No station shall broadcast programs in a language other than French or English for periods that in the aggregate

- (a) exceed fifteen per cent of the broadcast time per week of the station; or
- (b) where the licensee of the station has been authorized by the Board under this section to appropriate a larger percentage of the broadcast time of the station for programs broadcast in a language other than French or English, exceed the percentage of its broadcast time that the Board has authorized the licensee to appropriate for such programs.

(2) The Board may, upon application by a licensee and without holding a public hearing in respect of the application, authorize the licensee to appropriate for the broadcasting of programs in a language other than French or English a percentage of the broadcast time of a station exceeding fifteen per cent but not exceeding twenty per cent of such broadcast time.

(3) A licensee may apply to the Board for authorization to appropriate more than twenty per cent of the broadcasting time of a station for the broadcasting of programs in a language other than French or English and shall show in such application

- (a) that there is a sufficient number of non-French or non-English speaking people in his coverage area to justify the granting of the authorization;
- (b) his reasons for believing that such broadcasts will help to integrate those people into the community; and
- (c) the methods by which he will exercise control over such programs and advertising content of such broadcasts.

(4) The Board may, after holding a public hearing in respect of an application made under subsection (3), authorize the station in respect of which the application

is made to broadcast programs in a language other than French or English for periods that in the aggregate exceed twenty per cent but do not exceed forty per cent of the broadcast time per week of the station.

(5) This section does not apply to programs broadcast in an Eskimo or Canadian Indian language.³⁵

An almost identical provision exists in the Radio (F.M.) Broadcasting Regulations.³⁶ Under the Radio (T.V.) Broadcasting Regulations,³⁷ programmes emanating from English- and French-language countries are put on the same footing. The General Radio Regulations³⁸ state that regardless of the language used for transmission every station shall identify itself at the end of transmission in English or French.

Somewhat puzzling are the Running Horse Regulations³⁹ adopted pursuant to the Criminal Code. Section 79 states: "Should the association desire to show on a daily race programme, any regulation covering the distribution of the pari-mutuel pools, it must do so in the language of the regulations as issued by the Department of Agriculture." It should also be noted that the Food and Drug Regulations⁴⁰ refer to the names of drugs and vitamins and state that they must be designated in either English or French.

13.10. From the foregoing it would thus appear that in juridical theory at least federal law treats French and English as almost equal official languages, although sometimes preference is given to English or the use of French is required only in the province of Quebec. We stress again that we venture no opinion on the extent to which the federal authorities respect in fact this juridical equality.

C. Within the Jurisdiction of the Provinces and Territories

1. Alberta

13.11. We have seen⁴¹ that a limited argument can be made that section 110 of the North-West Territories Act, as amended in 1891, has never been abrogated and that French might still be an official language of the Legislative Assembly of Alberta and in the courts of that province. On the other hand, the fact remains that according to the 1961 census, out of a total Alberta population of 1,331,944, no more than 42,276 (or 3.2 per cent) listed French as their mother tongue (while 6.3 per cent listed Ukrainian and 7.3 per cent German.)

The rules and orders of the Assembly⁴² are silent on the question of languages. The reference to "the usages and customs of the House of Commons" in rule 1 can certainly not be interpreted as importing the bilingualism which obtains in the federal Parliament. An informal survey that we conducted by questionnaire among members of the Legislative Assembly picked at random revealed that by custom and usage, rather than as a result of any specific statute, English has been the only language ever used in the legislature or in any of its committees. Our respondents also indicated that there had been no demand for the introduction of French or of any other language. What the situation was in the past is difficult to establish in view of the fact that official records of debates were not kept prior to 1965.

As indicated above, some doubt exists as to whether French has been abrogated in Alberta courts. At one time, section 40 of the Alberta Interpretation Act⁴³ provided that whenever public records were required to be kept or any written process to be had or taken, such records or process should be kept, had, or taken in the English language, but this provision no longer appears in the 1958 revision of the Act.⁴⁴

Alberta law gives limited recognition to the right to an interpreter.⁴⁵ It would appear, however, that in some lower courts in districts where there is a heavy concentration of Francophones, French is on occasion used unofficially in court proceedings.⁴⁶

Both the Municipal Districts Act and the City Act make knowledge of English a prerequisite of municipal office.⁴⁷ English is also treated as the only official language by the Alberta Companies Act,⁴⁸ although some French corporate names exist.⁴⁹ A knowledge of English is required for permission to work in the province's mines.⁵⁰ The Alberta School Act provides that "all schools shall be taught in the English language."⁵¹ It also used to state that the board of a district might authorize "a primary course to be taught in the French language."⁵² However, in 1964, section 386 of the Alberta School Act was amended⁵³ as follows:

386. (1) Notwithstanding section 385, the board of a district may by resolution direct that French be used as a language of instruction, in addition to the English language, in its school or schools in grades one to nine inclusive but in that case
- (a) in grades one and two, at least one hour a day shall be devoted to instruction in English,
 - (b) in grade three, not more than two hours a day shall be devoted to instruction in French, and
 - (c) in grades above grade three, not more than one hour a day shall be devoted to instruction in French.

From a practical point of view we can conclude that the only language which enjoys official status in Alberta is English, despite a recent judgement that French is a "permissive language" in the province.⁵⁴

2. *British Columbia*

13.12. We have seen⁵⁵ that no British Columbia statute ever conferred official status on any language, but that English seems to have acquired this status *de facto*. Indeed, according to the 1961 census, the total population of British Columbia of 1,629,082 numbered only 26,179 people (or 1.6 per cent) who gave French as their mother tongue.

Section 1 of the Standing Orders of the Legislative Assembly of British Columbia⁵⁶ also refers to the orders, usages, and customs of the House of Commons in the absence of British Columbia Regulations. There are no other provisions dealing with language. Our survey by questionnaire among the members of the legislature disclosed the same situation as in Alberta: by custom English was the only language ever used in debates, in committee, or in the records or reports of the Assembly.

The courts of the province are not governed by section 133 of the B.N.A. Act.⁵⁷ They do not need to give any recognition to French. Nor do British Columbia statutes provide for interpreters,⁵⁸ although interpreters are available and used when needed.⁵⁹ The only

pertinent provision we were able to find relating to the administration of public affairs was the Metalliferous Mines Regulations Act which required that persons demanding a blasting certificate know English.⁶⁰

There is thus no doubt that by custom and tradition English is the only language enjoying official status in British Columbia.

3. Manitoba

13.13. In 1890 Manitoba made English its sole official language.⁶¹ We have seen that there are some reservations as to the legality of this abolition of French.⁶² But after 1890 a number of statutory provisions were adopted to give effect to the change.⁶³

The rules and orders of the Legislative Assembly of Manitoba⁶⁴ do not contain any pertinent provisions other than the usual reference in rule 1(2) to the rules of the House of Commons and the requirement that notices of private bills be published in the *Manitoba Gazette* and "at least once in each week during four weeks, in an issue of a newspaper published in English."⁶⁵ Obviously, the above-mentioned statute of 1890 makes any explicit rules and orders unnecessary. However, our questionnaire addressed to members of the Manitoba legislature disclosed that some of them do on occasion make remarks in French which are recorded in that language in Hansard, together with a translation. Although the use of French appears to be infinitesimal, there is some indication that it is increasing slightly. We were informed by one member who replied to our questionnaire in French:

Since a very small minority of members speak and understand French, French is not used currently. Each French-speaking member says a few words in French each year to preserve the tradition.

On occasion also, when we have special visitors who are French-speaking in the galleries, they would be introduced in French by the Speaker of the Assembly. This is done particularly for student groups that visit us frequently.⁶⁶

The joint reply of three members stated that "French can be used freely, but because few understand it, it is used simply to mark the fact that it is official [*sic*]." They confirm the fact that French speeches are printed in the original version with an English translation. We were told that French is used mainly as a symbolic gesture. On occasion, the Speaker will greet prominent French-speaking visitors in French. French-speaking members (in 1966 they totalled four out of 57) may say a few words in French. Even the premier is said to have spoken a few sentences in French sometimes as a gesture. One respondent pointed out that this use of French could circumvent the 1890 statute because the latter refers only to the language of "records and journals" and not to the language of debate!

The courts of Manitoba do not fall under section 133 of the B.N.A. Act.⁶⁷ The only language officially permitted before them under the Manitoba Act is English. The Rules of Practice of the Court of Queen's Bench for Manitoba give a limited recognition to the right to interpreters,⁶⁸ although interpreters are used when needed. In fact, it was stated that French is used unofficially in some of the lower courts when all the participants and their lawyers are Francophones.⁶⁹ It will also be recalled that the Criminal Code provides for the right to a mixed jury in criminal trials in Manitoba.⁷⁰

The Manitoba Public Schools Act states that English shall be used as the language of instruction in all public schools with some limited exceptions:

240.(1) Subject to sub-section (2), English shall be used as the language of instruction in all public schools.

(2) When authorized by the Board of Trustees of a district, a language other than English may be used in any school in the district:

(a) during a period authorized herein for religious teaching;

(b) during a period authorized in the program of studies for the teaching of a language other than English; and

(d) before and after the school hours prescribed in the regulation and applicable to that school.⁷¹

Early in 1967 Bill 59⁷² was introduced to amend The Public Schools Act and replace this section with the following:

240.(1) Subject as in this section otherwise provided, English shall be used as the language of instruction in all public schools.

(2) When authorized by the board of trustees of a district, area or division, a language other than English may be used in any school in the district, area or division

(a) during a period authorized for religious teaching;

(b) during a period authorized by the minister for teaching a language other than English; and

(c) before and after the school hours prescribed in the regulations and applicable to that school.

(3) Subject as herein provided, the French language, being one of the two languages to which reference is made in the *British North America Act*, 1867, may be used in the public schools as a language of instruction.

(4) A board of a district, area or division may request the minister to approve a proposal to use, subject as herein provided, the French language in the instruction of social studies and such other subjects as the minister may, by regulation, stipulate, in a school in the district, area or division, as the case may be. . . .

(7) The total time in which a language other than English may be used

(a) as the language of instruction under a proposal made under subsection (4) and approved by the minister under this section; and

(b) under clauses (a) and (b) of subsection (2);

shall not exceed one-half of the instructional time in any day.

(8) No pupil shall be required to receive instruction in the French language under a proposal made under subsection (4) if his parent or guardian makes written objection thereto.

(9) The minister, in his absolute discretion, and having regard to pedagogical and administrative factors, may approve, reject or suspend all or any part of a proposal made under subsection (4); and, where he approves such a proposal or a part thereof, he may approve it subject to such terms and conditions as he may deem necessary or advisable, and without limiting the generality of the foregoing he may, in connection with any such proposal,

(a) limit the use of the French language as a language of instruction under the proposal to certain subjects or to certain parts thereof;

(b) specify the grades in which the French language may be used as the language of instruction under the proposal;

(c) prescribe the qualifications for teachers who may use the French language as

a language of instruction under the proposal; and

(d) require the board to make satisfactory provision for the instruction in English of any pupil whose parent or guardian makes an objection under subsection (8);

or do any one or more of the things mentioned in clauses (a), (b), (c) and (d).

We have noted that some Manitoba city charters require a knowledge of English as a qualification for municipal office although the Metropolitan Winnipeg Act states that to qualify for election it is sufficient to be "able to read the English or French language and write it from dictation."⁷³ A very limited recognition of the presence of a French ethnic minority is also found in various Manitoba statutes dealing with public notices⁷⁴ and in the Manitoba Employment Standards Act⁷⁵ and in some statutes dealing with education,⁷⁶ but other statutory provisions either ignore French or require English.⁷⁷ Manitoba law also allows specifically for French corporate names.⁷⁸

English is the official language of Manitoba; however, French has received official recognition to a very limited but growing extent. This situation may reflect both the historical background of the province and the fact that it has a relatively substantial French-speaking population (according to the 1961 census, 60,899, out of a total population of 921,686, list French as their mother tongue). Elsewhere in this report we have examined the mechanics of giving a more formal, although geographically limited, recognition to French in court proceedings⁷⁹ and at the municipal level,⁸⁰ but of course it is not for us to say whether such measures should be implemented.

4. New Brunswick

13.14. New Brunswick has no statutory provisions governing language.⁸¹ The Standing Rules of the Legislative Assembly have the usual reference to the usages and customs of the House of Commons.⁸² The only pertinent provision which gives significant recognition to the presence of an important French minority is rule 86 concerning private bills.

A person intending to present a petition for the enactment of a Private Bill shall cause a notice, stating clearly and distinctly the nature and objects thereof and signed by or on behalf of the applicant with the address or the party signing the same, to be published as follows:

(a) once in the Royal Gazette at least two weeks before filing the petition;

(b) once a week for three successive weeks before filing the petition in a newspaper published or having a general circulation in the County which is, or in which is situated the Municipality, or in which reside the parties or the majority of the parties, interested in or to be affected by the Bill; and

(c) when such County is largely composed of French speaking persons, in French in a newspaper published wholly or partly in the French language and having a general circulation in the County.⁸³

The use of French is relatively frequent in the New Brunswick Assembly. In his "Notes on Parliamentary Procedure," George Bidlake, Clerk of the Legislative Assembly (1925-36), writing in 1930, had already noted: "In this House latitude is usually allowed to French-speaking members whose lack of familiarity with English phraseology makes it rather difficult for them to speak off-hand in that language. Having to think in one language and speak in another is not conducive to fluency in the latter."⁸⁴

This statement as to the use of French is borne out by the replies to our questionnaire. Our respondents agreed that English had achieved official status by custom and usage, but that French was also used both in debates of the Assembly and in committee. Their estimate as to the amount of French used was generally about 5 per cent, although one respondent set it as high as 10 per cent. All also agreed that they had noticed a steady increase in the use of French during the last 20 years. They stated that whenever French was used, the debate would be reported in French with an English translation. French is not only used by ordinary members but, on occasion, by cabinet ministers and even the premier. Even some English-speaking members will occasionally speak part of their speeches in French. Several members stated that French was not a working language, however, and that part of this bilingualism was directed mainly at the press and the voters. One reply stated that a member whose mother tongue is French "will usually deliver anywhere up to half of a 'major speech' (that is, in the Throne Speech or budget debates) in French," but in impromptu debates "almost without exception" speeches are in English. French appears to be used rarely if ever in the committee of the whole and only occasionally in the committee of supply (where it is sometimes used for part of a prepared speech dealing generally with the department whose estimates are under consideration). A few members said that there has been a growing demand in some *milieux* for placing French on the same official level as English. In 1966 all statutes were in English without translation. One member pointed out, however, that he had arranged for an unofficial translation to be made of *Le Code des Caisses Populaires*. Another wrote us: "In 1871 only the Debates of the Legislative Assembly, I believe, were printed both in French and English. Last year for the first time, I understood the Speech from the Throne was officially printed in both French and English. With those exceptions the publications indicated above are printed only in English."

The same member, apparently English-speaking, concluded: "In my opinion there has been, over the years, a steady increase in the use of the French in debates. I see no reason why this increase should not continue. Essentially, the increase is due to an increase in the number of Legislature members who are bi-lingual." The situation may have been modified, however, as a result of the Assembly's resolution of March 30, 1967, to have simultaneous translation of debates.

The courts of New Brunswick are not governed by section 133 of the B.N.A. Act.⁸⁵ Limited reference is made in the law of the province to the right to interpreters.⁸⁶ We were advised by most of our correspondents that in some jurisdictions, where all the parties and the magistrates are French-speaking, the entire case, particularly at the lower level, would be conducted in that language, although the record would be entered in English.⁸⁷ This *de facto* use of French is totally unofficial. It may soon be sanctioned as the result of Bill 53 introduced in 1967 to amend the New Brunswick Evidence Act by permitting with the consent of all interested parties, the use of a language other than English in judicial proceedings.⁸⁸ As for the possibility of creating bilingual judicial districts in the province, it was examined in Chapter IV.

We have had occasion to note⁸⁹ that some municipalities in New Brunswick conduct a good deal of their affairs in both languages or in French. The possibility of giving formal recognition to this state of affairs has also been referred to.⁹⁰ We also came across a

statute dealing with the town of Grand Falls which requires all notices to be in both languages.⁹¹ At one time New Brunswick medical practitioners were permitted to prescribe liquor necessary for health reasons in either English or French, but this provision (the right to prescribe) has been repealed.⁹² Some forms of municipal debentures are provided for in both languages.⁹³ We have also had occasion to note the widespread use of French or bilingual corporate names in the province.⁹⁴ New Brunswick, according to the 1961 census, has 597,936 inhabitants. Of these 210,530 (or 35.2 per cent of the total) declare that French is their mother tongue.

These figures explain perhaps why, of all the provinces outside Quebec, New Brunswick is obviously the one in which French is the closest to having acquired an official status alongside English. Official bilingualism appears to be more justified in this province than it is in any other, including Quebec, where the English-speaking minority is only 13.26 per cent of the total population.

5. Newfoundland

13.15. Newfoundland does not appear to have any legislation dealing with languages, nor do any constitutional statutes apply to it. The Standing Orders of the House of Assembly of Newfoundland⁹⁵ do not contain any reference to language use. Standing Order no. 1 contains the usual reference to the rules of the House of Commons. The replies to our questionnaire confirm that only English was ever used and that there appears to be no demand for any change. English seems to be the sole language enjoying official status, by custom and usage rather than by statute.

Section 133 of the B.N.A. Act does not apply to Newfoundland courts.⁹⁶ Nor does Newfoundland law seem to contain any provisions dealing with interpreters,⁹⁷ and the province seems to have little need for them.⁹⁸ We have seen that juries *de medietate linguae* were abolished in 1870.⁹⁹ The Newfoundland Companies Act provides that when any document required to be filed is not in the English language, a translation may be required.¹⁰⁰ English appears to be the only official language of Newfoundland, if not by statute at least by custom. Furthermore, the French-speaking population of the island is less than 1 per cent.

6. The Northwest Territories

13.16. In our review of the legal history of bilingualism in the Northwest Territories¹⁰¹ we concluded that section 11 of the North-West Territories Act was never legally abrogated.¹⁰² This section, which is reminiscent of section 133 of the B.N.A. Act, stated: "Either the English or the French language may be used by any person in the debates of the Council or Legislative Assembly of the North-West Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of the said Council, or Assembly; and all ordinances made under this Act shall be printed in both those languages."¹⁰³

In 1890 the North-West Territories Act was amended to read as follows:

Either the English or the French language may be used by any person in the debates

of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing the same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant-Governor in conformity with the law, and thereafter shall have full force and effect.¹⁰⁴

In effect, the bilingualism of Northwest Territories courts was put beyond reach of the Legislative Assembly, but the Assembly was permitted to regulate its own use of languages. On January 19, 1892, it passed a resolution making English the sole language of the Assembly, but so far as we can discover this resolution was never proclaimed, so that under the 1891 amendment to the North-West Territories Act it did not become law.¹⁰⁵ Consequently, it is our opinion that either English or French may be used by any person in the debates of the Legislative Assembly of the Northwest Territories and in the proceedings before their courts. In any case, since the courts of the Northwest Territories are created by Parliament, they are "Courts of Canada" and are required to be bilingual under section 133 of the B.N.A. Act.¹⁰⁶

Irrespective of our opinion that French is still an official language in the Council of the Northwest Territories, the Council itself seems to consider that English is the only language to be used in its debates and records. The mimeographed "Rules of the Council of the Northwest Territories" contain no pertinent provisions. Standing Order no. 1 contains the usual reference to the customs and usages of the House of Commons of Canada which, because of the similarity between the constitutional linguistic provisions governing the two Houses, would indeed be applicable. As indicated, there is little doubt that, in legal theory at least, the courts of the Northwest Territories are still bilingual. Interpreters are used to a considerable extent,¹⁰⁷ and in fact several ordinances provide specifically for their use.¹⁰⁸ Nevertheless, the Jury Ordinance stipulates that jurors must know English to qualify.¹⁰⁹ Theoretically speaking, the Council and the courts of the Northwest Territories should be bilingual, but in fact, they do not appear to be so, and as a result doubt may be cast on the legality of the ordinances of the Council. Very little practical recognition is given to the French language, which seems to be placed at the same level as any other foreign language.¹¹⁰ Evidently the situation might be explained by the fact that out of a total population of 22,998, only 994 (4.32 per cent) persons in the 1961 census listed French as their mother tongue.

7. *Nova Scotia*

13.17. We have concluded from the history of Acadia that the only language which ever had official status prior to Confederation was English.¹¹¹ The province has no statute dealing with language as such. In a letter dated September 28, 1965, we were advised by a government official as follows:

There is no specific reference to the use of a second language in the Nova Scotia Legislature. We have had periodically for many years the House addressed in the

French language by a Member. This would normally be done at least once during the Session.

When the Hansard is published, an English translation is given. The reverse, however, is not done and a general French language version of the Debates is not published.

Pursuant to our further inquiries this correspondent, in a letter of October 6, 1965, was kind enough to furnish us with the following additional information:

I have your letter of September 29th and I am sorry if I indicated to you in my earlier letter that there was only one French speaking Member in the Nova Scotia Legislature, or that only one Member might speak in French during a Session. I shall attempt to deal with the questions asked in your letter as best I can, considering the misunderstanding that already exists:

1. The following Members of the Nova Scotia Legislature are wholly bi-lingual: [4 members]. There are some other Members who have a reasonable familiarity with French and could, if the occasion arose, address the House in that language and could understand French speech by another Member.

2. I think there have always been one or more Members of the Legislature who are of French extraction and many, if not most of them, would on some occasion address the House in French.

3. On no occasion that I know of has a Member addressed the House in French for the want of adequate English, so I suppose it would be true to say that it was a symbolic gesture.

4. There is no particular point in a Session where the House would be addressed in French. It might be done in the Address in Reply to the Speech from the Throne or it might be done on a motion to go into Supply.

5. The person who does the English translation of a speech would vary from year to year.

6. There is no appreciable delay in the publication of an issue of Hansard because of a French address.

7. It is difficult to answer this question which is categorical. The House has been addressed in French by a French speaking Member for many years; or a Member addresses the House partially in English and partially in French during the same subject.¹¹²

8. The answer, I suppose, has to be "yes." The translation is done at the convenience of the Members of the House who do not speak French and would otherwise not know the content of the Member's speech.¹¹³

9. I do not know of any attempt ever having been made to make French the official language of debate and record.

One French-speaking member to whom we wrote on October 19, 1965, advised us that although his mother tongue was French, he had never addressed the legislature in French, not even partially and that, to his knowledge, there had never been any attempt in Nova Scotia to make French an official language of debate or of record in the legislature. However, on November 25, 1965, another French-speaking member replied as follows to our inquiry:

5. I have addressed the House in French in 1964 and 1965.

6. My speeches are mostly in English.

7. I addressed the House in French to illustrate the use of the French language.

8. There was no opposition.

9. I consider it a matter of courtesy that I have been permitted to address the House in French.

He also stated that there had been no attempt, to his knowledge at any rate, to make French an official language.

Our general questionnaire to members of the legislature confirmed that English was considered to be the only official language, by custom and usage rather than by statute, that French was spoken sometimes (the amount of French being used being estimated at 1 or 2 per cent), that there had been no perceptible increase in its use, and that any French speeches would be reported in French with an English translation. Since there are no French reporters, any member wishing to speak in French provides Hansard with a written copy which is printed. The courts of Nova Scotia do not fall under section 133 of the B.N.A. Act.¹¹⁴ Some reference is made to interpreters in the province's legislation,¹¹⁵ but Acadians who desire to testify through interpreters meet with judicial hostility.¹¹⁶

English is obviously the only language enjoying official status in Nova Scotia. Out of a total population of 737,007, only 39,568 claim French as their mother tongue, according to the 1961 census. However, the Acadian population is sufficiently concentrated in two counties to make the introduction therein of bilingual justice and bilingual local administration conceivable.¹¹⁷ At the present time, the only official recognition given to the French language is the granting of a few French corporate names.¹¹⁸

8. Ontario

13.18. Although at one time some measure of recognition was given to French in Upper Canada,¹¹⁹ English appears since Confederation to have been taken as the official language of the province. The Rules of the Legislative Assembly of Ontario¹²⁰ contain in section 1(b)(2) the usual reference to the rules of the House of Commons of the United Kingdom. There is nothing specifically on language. Alex C. Lewis, formerly Clerk of the Legislative Assembly, has stated, "A member must address the House in English only. . . ."¹²¹ On September 29, 1965 Mr. Roderick Lewis, Q.C., Clerk of the Legislative Assembly, forwarded to us the following Memorandum:

Memorandum re Rule That English Only May Be Spoken In The Legislature

The statement in Lewis' *Parliamentary Procedure in Ontario*, page 83, "A Member must address the House in English," is actually a quotation from May's *Parliamentary Practice*. In the current edition—the 16th, this statement is to be found on page 444 and the citation given is *Parl. Deb.* (1901) 89, c. 546. The reference is to a ruling by the Rt. Hon. W.C. Gully, Speaker of the House of Commons, on the 19th of February, 1901. In rising to speak on the Throne Debate, Mr. O'Donnell, Member for Kerry W., attempted to address the House in Irish and Mr. Speaker stated the Rule of the House to be that Members must address the House in the English language only.

The Ontario Rules make no specific provision of this nature for very good reason; firstly, the English Rule above-stated applies; secondly, Section 133 of the B.N.A. Act expressly authorizes the use of the French language in addition to English in the Houses of Parliament of Canada and the Houses of the Legislature of Quebec. I submit, that, by inference, this restricts the Legislatures of the other Provinces to the use of English.

Roderick Lewis, Q.C.
Clerk, Legislative Assembly

The replies to our questionnaire bore out the view that English is considered the sole official language in Ontario, that all debates are exclusively in English, and that French is never used although there appears to have been some limited demand that French be permitted. One respondent stated that very rarely (less than 1 per cent of the time) some member would make a small part of a speech in French: "A bilingual member will sometimes speak a paragraph or two in French in the two major debates, in which case the part as spoken is so reported in Hansard."

The courts of the province are not governed by section 133 of the B.N.A. Act.¹²² In fact, the Adjudicature Act provides specifically that "Writs, pleadings and proceedings in all courts shall be in the English language only, but the proper or known names of writs or other processes, or technical words, may be in the same language as has been commonly used."¹²³ Nevertheless, we found¹²⁴ that it is not unusual for cases in lower jurisdictions to be conducted entirely in French when all the parties and the magistrate are French-speaking, as happens in those judicial districts where there is a heavy concentration of French Canadians. In fact, the distribution of population in some counties is such that it renders conceivable the creation of bilingual judicial and administrative districts.¹²⁵ It should also be noted that Ontario law recognizes very explicitly the right to interpreters.¹²⁶ Mixed juries, which had at one time existed in the province, were abolished in 1791.¹²⁷

In the conduct of official business, English seems to be the only language recognized. The School Administration Act provides:

It is the duty of a teacher,

(e) to use the English language in instructions and in all communications with the pupils in regard to discipline and management of the school, except where it is impracticable to do so by reason of the pupil not understanding English, but recitations requiring the use of a text book may be conducted in the language of the text book.¹²⁸

When Ontario law provides for signs or notices to be erected or given, they must be in English.¹²⁹ Foremen and supervisory personnel in mines are required to understand English.¹³⁰ On the other hand, an indirect and passing recognition of French is found in some statutes dealing with education¹³¹ and in French corporate names.¹³² It is obvious that despite its sizable French minority (425,302 persons giving French as their mother tongue, out of a total population of 6,236,092), Ontario recognizes only English as an official language.

9. *Prince Edward Island*

13.19. There are no provisions dealing with language in any statute affecting Prince Edward Island. Section 1 of the rules of the Legislative Assembly¹³³ contains the usual reference to the orders and customs of the House of Commons of Canada. The replies to our questionnaire confirmed, however, that English is considered the sole official language by custom and usage, that French is never used and that there is no demand for its use. One member stated:

I have been in the Legislature of this province for twenty-five years and have heard

French spoken on two occasions. We have but two members of Acadian descent in our House. One speaks French quite fluently and the other speaks French very badly. If we were to have another language in our Legislature it would be Gaelic. We have more members who speak Gaelic than members who speak French. Seventeen of our thirty members in the present House are descendants from forefathers who came from the highlands of Scotland.

An official of the Legislative Assembly commented:

Bilingual members are very rare in Prince Edward Island. Occasionally a bilingual member of Acadian descent will speak very briefly in French "to honour the mother tongue" but to be understood by the majority of the House, a Member must speak in English. No simultaneous translation is provided in the Prince Edward Island Legislative Assembly. Records of the House will print in French that portion of a Member's address spoken in French. A bracketed translation into English is also printed.

French is used less than 1 per cent of the time. It should be recalled that the 1961 census shows that only 7,958 people (7.6 per cent) out of a total population of 104,629 claim French as their mother tongue. Section 133 of the B.N.A. Act does not apply to the courts of this province.¹³⁴ There does not appear to be any statutory provision dealing with interpreters,¹³⁵ but interpreters are used when needed.¹³⁶ Obviously the only language enjoying official status in Prince Edward Island is English, by custom rather than by statute.

10. *Quebec*

13.20. Quebec is the only province referred to specifically in section 133 of the B.N.A. Act. Consequently, in the Quebec legislature either French or English may be used in debates, and both those languages must be used in its records and journals and in the printing of Quebec statutes. French or English are also allowed in any court of the province. The precise scope of these provisions has been shown to be very narrow.¹³⁷ Furthermore, the possibility has been raised that Quebec can abrogate section 133 unilaterally.¹³⁸ The constitutional requirement that the debates and records of the legislature be bilingual has been given effect in the Rules and Standing Orders of the Legislative Assembly.¹³⁹ They make the usual reference to the rules and practices of the House of Commons of Canada,¹⁴⁰ but also contain some special rules to which we should like to draw attention.

The following rules make provisions for the conduct and recording of debates, votes, and proceedings:

132. After each sitting day, the clerk shall cause a short record of the votes and proceedings of the house to be prepared and printed in the French and English languages. . . .

134. The clerk shall cause a complete record of the votes and proceedings of the house to be prepared in the form of a journal and, the session being closed, to be printed and distributed in the French and English languages. . . .

272. Every member who has been called upon to speak may as he pleases, use the French or English language.

294. Any member present while a motion has been read or stated in either language, may require that it be read or stated again in the other language.

Notice of motions shall be given in writing in the French or English language.¹⁴¹ Every motion may be submitted in the French or English language.¹⁴² Special committees are governed by the same rules as committees of the whole House, *mutatis mutandis*.¹⁴³ Reports of special committees shall be drafted in both languages.¹⁴⁴ All petitions to the legislature shall be either in French or English and be accompanied by a certified translation in the other language.¹⁴⁵

Careful provisions are also made with respect to the printing of bills:

[535] 1. Every bill shall be printed and distributed in the French and English languages before being proposed to be read a second time, and all proposed resolutions relating to bills and referred to a committee of the whole house shall be printed and distributed in the French and English languages before being examined in such committee.

2. After allowing the second reading of the bill to be debated or the proposed resolutions to be examined in committee, it shall not be permissible to object that the bill or the proposed resolutions have been printed in one language only.

560. Subject to the restrictions as set forth in paragraph 2 of rule 561, after the second reading of any public bill, the house shall forthwith resolve itself into committee for the consideration of the bill, unless the bill is moved to be referred to a select committee, or notice of any instruction to be proposed thereon has been given, or the bill has been ordered by the house to be reprinted and it has not yet been reprinted and distributed in the French and English languages.

Similar provisions are found with respect to private bills.

[602] 1. Two copies of the bill in the French or English language, with, endorsed thereon, the name of the member who shall take charge of the bill, shall be deposited with the clerk of the committee on private bills, at least three weeks before the opening day of the session.

2. There shall also be, at the same time, deposited with the accountant of the Legislative Assembly a sum sufficient to pay for translating the bill, for its printing in French and in English, and for correcting and revising the printing; such translation to be done, in all cases, by the officers of the house and the printing by the government contractor.

Every petition for the introduction of a private bill must be previously advertised by public notice¹⁴⁶ in connection with which Rule 611 is as follows:

1. Every notice shall be published in the Quebec Official Gazette in the French and English languages, and in a French newspaper in the French, and in an English newspaper in the English language, in the judicial district comprising the locality to be affected or in the judicial district where the majority of the parties interested reside.

2. If there is no French or English newspaper in the judicial district where a notice is required to be advertised, such notice shall be published in a French or an English newspaper, as the case may be, in the nearest judicial district.

Rule 652 (1) is also pertinent: "In addition to the sums and fees payable under rules 602 and 603, the promoters of any private bill shall, immediately after the second reading of such bill, deposit with the accountant of the Legislative Assembly a sum sufficient to pay the cost of printing the proposed act in the Statutes book of the session." From the foregoing it is evident that the Quebec legislature has been even more careful than has the

federal Parliament to ensure complete bilingualism of all its proceedings. In our examination of the Quebec legislative process¹⁴⁷ we noted the various provisions (in the Interpretation Act, the Civil Code, and laws dealing with the Revised Statutes) that provided specifically for bilingual publication of all Quebec statutes.

As in the case of federal subordinate legislation, we have concluded¹⁴⁸ that there is no constitutional requirement that Quebec subordinate legislation or administrative law be bilingual. Our study¹⁴⁹ disclosed that the most important regulations issued by Quebec administrative bodies are bilingual, but this practice is not based on any constitutional—or for that matter, statutory—obligation.

Section 133 of the B.N.A. Act allows the use of either French or English in any court of the province. We have defined in 4.17 what is meant by the term “the courts of Quebec.” Procedure in Quebec courts is entirely bilingual. The Code of Civil Procedure provides specifically for interpreters¹⁵⁰ and despite the usual practical difficulties, interpreters are used fairly widely.¹⁵¹ Furthermore, in addition to the mixed juries or juries in the accused’s language provided for by the Criminal Code,¹⁵² Quebec has extensive provisions for civil juries composed according to the language of the parties.¹⁵³ As we noted earlier,¹⁵⁴ section 133 of the B.N.A. Act cannot be deemed to apply to quasi-judicial functions of administrative boards and commissions. In our study of Quebec quasi-judicial boards and commissions¹⁵⁵ we established that although more than 80 per cent of all proceedings before these quasi-judicial entities are conducted in French, a sufficient proportion is presented in English to indicate that these boards are bilingual in fact if not in law. The personnel of these tribunals is almost entirely bilingual.¹⁵⁶ Unless specifically excepted, the proceedings of a municipal council, the publication of notices and by-laws, and all public notices are required to be bilingual.¹⁵⁷ This requirement is not necessarily respected in practice by all municipalities.¹⁵⁸ We also suggested that the legal imposition of this official bilingualism might not be realistic.¹⁵⁹

In general Quebec law provides for a large measure of bilingualism, or a choice between French and English, in large areas of public administration: public notices,¹⁶⁰ signs, labels, and notice boards,¹⁶¹ official forms,¹⁶² and ballot forms.¹⁶³ When linguistic qualifications are imposed as a condition of employment in any official or private function, French and English are generally treated as equals, the requirement of bilingualism itself being practically non-existent.¹⁶⁴ Quebec law also requires documents issued by carriers to be bilingual and stipulates that any party to a labour contract may demand that it be drawn up in both languages.¹⁶⁵ Corporations may be chartered in either language or in both and may keep their by-laws and make their returns in the language of their choice.¹⁶⁶ The musical, literary, and scientific competitions sponsored by the province either provide for English categories or allow participants to compete in either language.¹⁶⁷ It is evident that of all Canadian jurisdictions, including the federal government, Quebec has given the widest official status to both languages and treats English, at least from a legal point of view, as being equal with French.

11. *Saskatchewan*

13.21. Our remarks in connection with the situation in Alberta¹⁶⁸ apply equally to

Saskatchewan. French may still be an official language of the Legislative Assembly of Saskatchewan and in the courts of that province. Naturally, the question is somewhat academic since the population of that province, which numbers 925,181, includes only 36,163 persons (3.9 per cent of the population) giving French as their mother tongue. This proportion is much smaller than that of citizens whose mother tongue is German (9.68 per cent) or Ukrainian (7.25 per cent). In any case, Saskatchewan has no specific language legislation.

Standing Order no. 1 of the Legislative Assembly of Saskatchewan¹⁶⁹ contains the usual reference to the orders, usages, and customs of the House of Commons. The only apparently pertinent provision is Standing Order no. 82 which requires publication of a notice of all petitions for private bills to be made in the *Saskatchewan Gazette* and in four consecutive issues of a newspaper "published in English." Our questionnaire to members of the Assembly elicited that to all intents and purposes English is the only language used except for an infinitesimal use of French, and sometimes Ukrainian, on special occasions. One member said: "English is invariably regarded as the language of the legislature. Some years ago a member gave a brief speech in French on a traditional occasion. More recently several Ukrainian members have spoken in their language on such occasions. Otherwise all proceedings are in English." It was stated that any such French or Ukrainian statements would appear only in translation in the official records of debate. One member said he had heard only one French speech in 10 years in the Assembly. Our respondents treated English as the sole official language on the basis of custom and usage rather than statutory authority. One member described the amount of French used as "microscopic."

Subject to the reservation already indicated, the courts of Saskatchewan are not governed by section 133 of the B.N.A. Act.¹⁷⁰ Despite some indication that French was sometimes used in the lower courts, English, to all intents and purposes, is the official language.¹⁷¹ Some provisions are made for the right to interpreters in court proceedings.¹⁷² Although Saskatchewan statutes do not deal specifically with the question of language, they seem to imply that English is the only language in which obligatory notices can be given.¹⁷³ English is also a prerequisite for election or appointment to offices in the educational system.¹⁷⁴ Section 209 of the Saskatchewan School Act¹⁷⁵ states:

209. (1) English shall be the sole language of instruction in all schools, and no language other than English shall be taught during school hours.

(2) When the board of a district passes a resolution to that effect, the French language may be taught as a subject for a period not exceeding one hour in each day as a part of the school curriculum, and such teaching shall consist of French reading, French grammar and French composition.

(3) Where the French language is being taught under subsection (2), any pupils in the schools who do not desire to receive such instruction shall be profitably employed in other school work while such instruction is being given.

In 1967, Bill 27¹⁷⁶ was introduced to amend section 209 of the School Act in the following manner:

11. Subsections (1) and (2) of section 209 are repealed and the following subsections are substituted therefor:

(1) Except as may be otherwise provided in this Act, English shall be the

language of instruction in all schools.

(2) Subject to the regulation of the department, where the board of a district passes a resolution to that effect French may be taught or used as the language of instruction for a period of one hour or for periods aggregating not more than one hour in a day as part of the school curriculum.

At the time of writing it is not known yet whether this amendment will be approved.

We can thus conclude that English is the only language which enjoys official status in this province.

12. The Yukon Territory

13.22. We came to the conclusion¹⁷⁷ that as in the Northwest Territories, French must still be deemed an official language of the Legislative Council and courts of the Yukon Territory. On the other hand, there can be little demand for French in an area which according to the 1961 census had only 443 inhabitants (or 3.02 per cent of the total) stating that French was their mother tongue.

The mimeographed "Standing Orders and Rules of the Legislative Council of the Yukon Territory" contain no references to language other than the usual reference in Standing Order no. 1 to the usages, orders, and customs of the House of Commons. A senior adviser to the government of the Yukon Territory wrote us on October 14, 1965, as follows:

... there does not seem to be any need for bilingual publication in the Yukon. We would also have considerable difficulty in typing and transcribing into the French language if our legislation and regulations had to be cast in both languages. Speaking as a practical man and giving it a business man's assessment, I would say that the additional expense of preparing documents for exclusive use in the Yukon in both languages would be unwarranted. So far as I am aware there are no monoglot French in the Yukon and if bilingualism had to be stressed the emphasis should be laid in favour of monoglot Indians who do form a sizeable proportion of our population.

Both for the reasons referred to above and for the reason that, being created by the federal Parliament, the courts of the Yukon must be deemed to fall within the ambit of section 133 of the B.N.A. Act.¹⁷⁸ we are of the opinion that French may be used in these courts no matter how infinitesimal the actual demand for it might be in practice. Facilities for interpreters do exist, however.¹⁷⁹

In practice, English is treated as the only official language in the Yukon,¹⁸⁰ but we believe that a strong constitutional argument can be made for the recognition of French, alongside English, as a language which may be used in the Legislative Council and in the courts of the Territory. Indeed, because French versions thereof were not adopted and published, we suggest that there may be some doubt as to the technical validity of Yukon ordinances.

D. General Conclusions: The Official Status of French and English throughout Canada

13.23. We can thus conclude that from a legal point of view there are only two jurisdictions in which there is no doubt that both languages enjoy almost equal official status: the federal and Quebec jurisdictions. An academic argument can be made for official bilingualism in the Northwest Territories and the Yukon. In all other provinces, despite some technical reservations about Alberta and Saskatchewan, a limited measure of recognition of French in New Brunswick, and some inroads by French into the official life of some provinces, English is the only official language.

In most jurisdictions, this situation only reflects the distribution of population. But, as we pointed out in 4.38, it calls for some qualification in provinces such as Nova Scotia, Ontario, and Manitoba which have substantial concentrations of citizens whose mother tongue is French. Furthermore, and notwithstanding any historical or constitutional argument to the contrary, it just does not make sense that New Brunswick, 35.2 per cent of whose population is French-speaking, should be unilingually English while Quebec, whose English population is only 13.26 per cent of the total and mainly centred on the island of Montreal, is totally bilingual.

It is also apparent, as we have had occasion to note repeatedly, that no Canadian jurisdiction has yet had an overall approach to language rights and that most legislation is the result of an *ad hoc* attitude to the solution of specific problems. In some this may be due to the absence of any real necessity to deal with the subject in a general and comprehensive way, but most often it would seem that this situation stems from the failure, or refusal, to fill the obvious gaps in the constitution and to face the political and cultural significance of ensuring language rights. There may be many other explanations for this lack of a broad linguistic bill of rights or it may even have been the least perilous course of action in the past. Nevertheless it is clear to us that it will become increasingly difficult in the future to maintain this haphazard and piecemeal approach.

Name _____
(Department or Agency)

1. With reference to the different types of subordinate legislation which come under the administration of your Department

a) Does your Department issue regulations, as defined by the Regulations Act R.S.C. 1952 c.235, which are approved by the Governor General in Council on the recommendation of your Minister?

_____ Yes

_____ No

If yes: About how many including amendments have been issued during the past twelve months?

b) Does your Department issue regulations, as defined by the Regulations Act R.S.C. 1952 c. 235, which are made on the direct authority of your Minister?

_____ Yes

_____ No

If yes: About how many including amendments have been issued during the past twelve months?

c) Does your Department issue regulations which are exempted from publication in the *Canada Gazette* by the Regulations under Section 9 of the Act SOR-54-569?

_____ Yes

_____ No

If yes: About how many including amendments have been issued during the past twelve months?

- d) Does your Department issue other rules, orders or instructions, not included within the terms of the Regulations Act—which affect only your own Department?

_____ Yes

_____ No

If yes: About how many including amendments have been issued during the past twelve months?

- e) Does your Department issue other rules, orders, instructions, not included within the terms of the Regulations Act—which affect the public?

_____ Yes

_____ No

If yes: About how many including amendments have been issued during the past twelve months?

2. What role does the Justice Department play in the drafting of the various types of subordinate legislation which are made by your Department?

- a) Regulations published in the *Gazette* (check one)

_____ Does all the drafting

_____ Involved in the revision only

_____ Not involved in either the drafting or revision

_____ Not applicable: regulations of this type not issued by our Department

- b) Regulations exempted from publication in the *Gazette* (check one)

_____ Does all the drafting

_____ Involved in the revision only

_____ Not involved in either the drafting or revision

_____ Not applicable: regulations of this type not issued by our Department

- c) Other rules, orders or instructions not included within the terms of the Regulations Act (check one)

_____ Does all the drafting

_____ Involved in the revision only

_____ Not involved in either the drafting or revision

_____ Not applicable: rules, orders or instructions of this type not issued by our Department

3. (This question is concerned with the *drafting* of subordinate legislation in your Department.)

- A. In what language are those regulations published in the *Gazette* drafted?

	Always	Sometimes	Never
In English	()	()	()
In French	()	()	()
Concurrently	()	()	()
In English with a translator present	()	()	()

In French with a translator present	()	()	()
Not applicable	()		

B. In what language are those regulations not published in the *Gazette* drafted?

	Always	Sometimes	Never
In English	()	()	()
In French	()	()	()
Concurrently	()	()	()
In English with a translator present	()	()	()
In French with a translator present	()	()	()
Not applicable	()		

C. In what language are those rules, orders, instructions not included within the terms of the Regulations Act drafted?

	Always	Sometimes	Never
In English	()	()	()
In French	()	()	()
Concurrently	()	()	()
In English with a translator present	()	()	()
In French with a translator present	()	()	()
Not applicable	()		

4. If you have indicated in reply to question 3 that French is not used in the process of drafting, to which of the following reasons do you attribute the practice of your Department?

	Yes	No
Time involved	()	()
Past practice	()	()
Lack of qualified French draftsmen	()	()
Language of drafting officers	()	()
Desire for uniformity	()	()
Costs involved	()	()
Others (please specify)		

5. (This question pertains to the *translation* of the different types of subordinate legislation.)

A. Regulations published in the *Gazette*: (check which apply)

(i) Where are they translated?	
— In your Department	()
— At the central translation bureau	()
— Elsewhere (please specify)	()

(ii) By whom are they translated?

- An official of your Department ()
- A member of the translation bureau in your department ()
- Others (please specify) ()

(iii) At what stage in the drafting process is the translation done?

- During the first draft ()
- After the first draft ()
- During the final draft ()
- After the final draft ()

B. Those regulations exempted from publication in the *Gazette*: (check which apply)

(i) Where are they translated?

- In your Department ()
- At the central translation bureau ()
- Elsewhere (please specify) ()

(ii) By whom are they translated?

- An official of your Department ()
- A member of the translation bureau in your Department ()
- Others (please specify) ()

(iii) At what stage in the drafting process is the translation done?

- During the first draft ()
- After the first draft ()
- During the final draft ()
- After the final draft ()

C. Other rules, orders, instructions, not included within the terms of the Regulations Act: (check which apply)

(i) Where are they translated?

- In your Department ()
- At the central translation bureau ()
- Elsewhere (please specify) ()

(ii) By whom are they translated?

- An official of your Department ()
- A member of the translation bureau in your Department ()
- Others (please specify) ()

(iii) At what stage in the drafting process is the translation done?

- During the first draft ()
- After the first draft ()
- During the final draft ()
- After the final draft ()

6. Please state how many of the regulations which are exempted from publication in the *Gazette* are issued in both languages, in English only, in French only (see Annex 1):

— In English and French

Estimated number June 64–June 65

- In English only

Estimated number June 64—June 65
- In French only

Estimated number June 64—June 65
7. Please state how many of these rules, orders, instructions, not included within the terms of the Regulations Act are issued in both languages, or in English only or French only (see Annex 2):

— In English and French

Estimated number June 64—June 65

— In English only

Estimated number June 64—June 65

— In French only

Estimated number June 64—June 65
8. In general, where both English and French texts are published, is the publication (a) of the texts of regulations not published in the *Gazette* and (b) of those orders, rules, instructions, not included within the terms of the Regulations Act simultaneous or is there a delay in the publication of one text?

(i) Regulations not published in the *Gazette*:

Simultaneous

()

Not simultaneous

()

If not simultaneous please estimate the average delay:

(ii) Rules, orders, instructions, not included in the terms of the Regulations Act:

Simultaneous

()

Not simultaneous

()

If not simultaneous please estimate the average delay:

9. (a) How many legal officers are there in your Department?

(b) How many of the legal officers in your Department are bilingual?

(c) If bilingual, please estimate the degree of facility with which the legal officer(s) read(s) and write(s) both languages:

	Excellent	Good	Fair	Poor
Reading ability in English	()	()	()	()
Writing ability in English	()	()	()	()
Reading ability in French	()	()	()	()
Writing ability in French	()	()	()	()

10. (a) What problems, in your view, would simultaneous drafting in English and in French create?
- (b) Do you feel that texts of regulations published in two languages present special problems of interpretation after they are published?

_____ Yes

_____ No

Please list any such problems that have been encountered with the regulations of your Department:

Annex 1 (for question 6)

Please list in very general terms the different types of regulations made by your Department which are published in both languages, those which are published in English only and those which are published in French only:

In both languages:

In English only:

In French only:

Annex 2 (for question 7)

Please list in very general terms the different types of regulations made by your Department which are published in both languages, those which are published in English only and those which are published in French only:

In both languages:

In English only:

In French only:

Departments

Agriculture	National Health and Welfare
Defence Production	National Revenue, Customs and Excise
External Affairs	National Revenue, Taxation
Finance	Northern Affairs and National Resources
Fisheries	Public Works
Forestry	Post Office
Industry	Trade and Commerce
Insurance	Transport
Labour	Veterans Affairs
National Defence	

Intermediate Agencies

Canadian Penitentiaries Service	Secretary of State, Patents and Copyright Office
Chief Electoral Officer	Secretary of State, Trade Marks Office
Civil Service Commission	Royal Canadian Mounted Police
Comptroller of the Treasury	

Boards and Commissions

Atlantic Development Board	Dominion Coal Board
Atomic Energy Commission	Export Credits Insurance Corp.
Air Transport Board	Farm Credit Corp.
Board of Broadcast Governors	Fisheries Research Board
Board of Grain Commissioners	International Joint Commission
Board of Transport Commissioners	National Capital Commission
Canadian Arsenal Ltd.	National Defence Research Board
Canadian Broadcasting Corporation	National Energy Board
Central Mortgage and Housing Corp.	St. Lawrence Seaway Authority
Canadian National Railways	Tax Appeal Board
Canadian Pensions Commission	Tariff Board
Canadian Wheat Board	Unemployment Insurance Commission

Questionnaire Concerning the Administration,
Drafting, and Publication of Subordinate Legislation
by Quebec Departments and Agencies*

9. Concerning your regulations:

a) Has your administration drafted and issued regulations

- | | |
|--|--------------------|
| 1. In French? | Yes _____ No _____ |
| 2. In English? | Yes _____ No _____ |
| 3. In French and in English? | Yes _____ No _____ |
| 4. Not applicable, no regulations are made | Yes _____ No _____ |

b) Has the Lieutenant-Governor in Council (the cabinet) issued regulations for your organization

- | | |
|---|--------------------|
| 1. In French? | Yes _____ No _____ |
| 2. In English? | Yes _____ No _____ |
| 3. In French and in English? | Yes _____ No _____ |
| 4. Not applicable, no regulations issued by the
Lieutenant-Governor in Council | _____ |

c) Do the regulations issued by your organization have to be approved by the Lieutenant-Governor in Council?

Yes _____
No _____

d) Do the regulations of your administration have to be published in the *Official Gazette* of Quebec?

Yes

If yes at what date

No

e) Are there provisions in your regulations concerning

1. The English or French language?

Yes

If yes, please state which provisions

No

*Both French and English versions of this questionnaire were used.

2. A language other than English or French?

Yes _____

No _____

11. What role does the Justice Department play in the drafting of the various types of subordinate legislation which are made by your department?

a) Regulations published in the *Gazette* (check one)

_____ Does all the drafting

_____ Involved in the revision only

_____ Not involved in either the drafting or revision

_____ Not applicable: regulations of this type not issued by our Department

b) Regulations exempted from publication in the *Gazette* (check one)

_____ Does all the drafting

_____ Involved in the revision only

_____ Not involved in either the drafting or revision

_____ Not applicable: regulations of this type not issued by our Department

c) Other rules, orders or instructions not included within the terms of the Regulations Act (check one)

_____ Does all the drafting

_____ Involved in the revision only

_____ Not involved in either the drafting or revision

_____ Not applicable: rules, orders or instructions of this type not issued by our Department

12. (This question is concerned with the *drafting* of subordinate legislation in your organization.)A. In what language are those regulations published in the *Gazette* drafted?

	Always	Sometimes	Never
In English	()	()	()
In French	()	()	()
Concurrently	()	()	()
In English with a translator present	()	()	()
In French with a translator present	()	()	()
Not applicable	()		

B. In what language are those regulations not published in the *Gazette* drafted?

	Always	Sometimes	Never
In English	()	()	()
In French	()	()	()
Concurrently	()	()	()
In English with a translator present	()	()	()
In French with a translator present	()	()	()
Not applicable	()		

C. In what language are all other less formal rules, orders, instructions drafted?

	Always	Sometimes	Never
In English	()	()	()
In French	()	()	()
Concurrently	()	()	()
In English with a translator present	()	()	()
In French with a translator present	()	()	()
Not applicable	()		

13. If you have indicated in reply to question 12 that English is not used in the process of drafting, to which of the following reasons do you attribute the practice of your Department?

	Yes	No
Time involved	()	()
Past practice	()	()
Lack of qualified English draftsmen	()	()
Language of drafting officers	()	()
Desire for uniformity	()	()
Costs involved	()	()
Others (please specify)		

14. (This question pertains to the *translation* of the different types of subordinate legislation.)

A. Regulations published in the *Gazette*: (check which apply)

- (i) Where are they translated?
 - In your Department ()
 - At the central translation bureau ()
 - Elsewhere (please specify) ()
- (ii) By whom are they translated?
 - An official of your Department ()
 - A member of the translation bureau in your Department ()
 - Others (please specify) ()
- (iii) At what stage in the drafting process is the translation done?
 - During the first draft ()
 - After the first draft ()
 - During the final draft ()
 - After the final draft ()

B. Those regulations exempted from publication in the *Gazette*: (check which apply)

- (i) Where are they translated?
 - In your Department ()
 - At the central translation bureau ()
 - Elsewhere (please specify) ()

(ii) By whom are they translated?

- An official of your Department ()
- A member of the translation bureau in your Department ()
- Others (please specify) ()

(iii) At what stage in the drafting process is the translation done?

- During the first draft ()
- After the first draft ()
- During the final draft ()
- After the final draft ()

C. All other less formal rules, orders, instructions: (check which apply)

(i) Where are they translated?

- In your Department ()
- At the central translation bureau ()
- Elsewhere (please specify) ()

(ii) By whom are they translated?

- An official of your Department ()
- A member of the translation bureau in your Department ()
- Others (please specify) ()

(iii) At what stage in the drafting process is the translation done?

- During the first draft ()
- After the first draft ()
- During the final draft ()
- After the final draft ()

15. Please state how many of the regulations which are exempted from publication in the *Gazette* are issued in both languages, in English only, in French only (*see* Annex 1):

— In English and French Estimated number June 64–May 31, 65

— In English only Estimated number June 64–May 31, 65

— In French only Estimated number June 64–May 31, 65

16. Please state how many of these less formal rules, orders, instructions are issued in both languages, or in English only or French only (*see* Annex 2):

— In English and French Estimated number June 64–May 31, 65

— In English only Estimated number June 64–May 31, 65

— In French only Estimated number June 64–May 31, 65

17. In general, where both English and French texts are published, is the *publication* (a) of the texts of regulations not published in the *Gazette* and (b) of all those less formal

orders, rules, instructions, simultaneous or is there a delay in the publication of one text?

(i) Regulations not published in the *Gazette*:

Simultaneous ()

Not simultaneous ()

If not simultaneous please estimate the average delay: _____

(ii) All less formal rules, orders, instructions:

Simultaneous ()

Not simultaneous ()

If not simultaneous please estimate the average delay: _____

18. (a) How many legal officers are there in your Department? _____

(b) How many of the legal officers in your organization have a fluent command of *spoken* English and French? _____

(c) How many of the legal officers in your organization have a fluent command of *written* English and French? _____

19. (a) What problems, in your view, would simultaneous drafting in English and in French create?

(b) Do you feel that texts of regulations published in two languages present problems of interpretation after they are published?

_____ Yes

_____ No

Please list any such problems that have been encountered with the regulations of your Department.

A. *Members of the Board*

- 1. Please indicate the total number of members of the Board: _____
- 2. Please indicate the number of members of the Board whose mother tongue is English: _____
- 3. Please state the number of members of the Board whose mother tongue is French: _____
- 4. Please state the number of English-speaking members who *read* French:
 - a) Well _____
 - b) Fairly well _____
 - c) With difficulty _____
 - d) Not at all _____
- 5. Please state the number of English-speaking members who *write* French:
 - a) Well _____
 - b) Fairly well _____
 - c) With difficulty _____
 - d) Not at all _____
- 6. Please state the number of English-speaking members who *speak* French:
 - a) Well _____
 - b) Fairly well _____
 - c) With difficulty _____
 - d) Not at all _____
- 7. Please state the number of French-speaking members who *read* English:
 - a) Well _____
 - b) Fairly well _____

*Both French and English versions of this questionnaire were used.

- c) With difficulty _____
 d) Not at all _____

8. Please state the number of French-speaking members who *write* English:

- a) Well _____
 b) Fairly well _____
 c) With difficulty _____
 d) Not at all _____

9. Please state the number of French-speaking members who *speak* English:

- a) Well _____
 b) Fairly well _____
 c) With difficulty _____
 d) Not at all _____

B. The Language of Proceedings before the Board

10. Is the "hearing examiner system" (this is when a single member of the Board is detailed to hear a case according to language) ever used by your Board?

- a) Yes — always _____
 b) Yes — often _____
 c) Yes — sometimes _____
 d) No _____

If "no," does the Board ever divide to hear cases in English or in French?

- a) Always _____
 b) Often _____
 c) Sometimes _____
 d) Never _____

11. Are proceedings before the Board conducted in both English and French?

- a) Yes _____
 b) No _____

12. What percentage of the cases before the Board are conducted in English? _____%

13. What percentage of the cases before your Board are conducted in French? _____%

14. From what regions of Canada do the French language cases come? (Please give details:)

15. Are both languages ever used in the course of a single hearing before the Board i) by members, ii) by witnesses, iii) by counsel?

i) By members:

- a) Yes — often _____
 b) Yes — sometimes _____
 c) Yes — rarely _____
 d) No — never _____

ii) By witnesses:

- a) Yes — often _____
- b) Yes — sometimes _____
- c) Yes — rarely _____
- d) No — never _____

iii) By counsel:

- a) Yes — often _____
- b) Yes — sometimes _____
- c) Yes — rarely _____
- d) No — never _____

16. (i) When French-speaking counsel are before the Board, do they plead in French or in English?

- a) Always in French _____
- b) Usually in French _____
- c) Sometimes in French _____
- d) Never in French _____
- e) Always in English _____
- f) Usually in English _____
- g) Sometimes in English _____
- h) Never in English _____

(ii) When English-speaking counsel are before the Board, do they plead in English or French?

- a) Always in English _____
- b) Usually in English _____
- c) Sometimes in English _____
- d) Never in English _____
- e) Always in French _____
- f) Usually in French _____
- g) Sometimes in French _____
- h) Never in French _____

17. What percentage of the written submissions and documents relative to cases before the Board are in English and in French?

- a) In English _____ %
- b) In French _____ %

18. Are proceedings before the Board conducted in the language of the written submissions and documents?

- a) Always _____
- b) Almost always _____
- c) Usually _____
- d) Half the time, or less _____

19. Does each member of the Board write a separate decision or does the Board deliver a single decision only?
- a) Each member writes a decision _____
- b) Single decision _____
20. What percentage of the decisions of the Board are delivered in English and in French?
- a) In English _____ %
- b) In French _____ %
21. How often are the decisions of the Board published in the language in which they are delivered?
- a) Always _____
- b) Almost always _____
- c) Usually _____
- d) Half the time, or less _____
22. Are the decisions of the Board which are delivered in French translated into English for publication?
- Yes _____
- No _____
23. Are the decisions of the Board which are delivered in English translated into French for publication?
- Yes _____
- No _____
24. Has there been an increase in the number of cases before your Board which have been heard in French during the last three years?
- a) No _____
- b) Yes _____
- If "yes," what percentage do you estimate this increase represents over the previous three years?
- _____ %
25. Please state in what percentage of the cases before your Board an interpreter is needed to translate a) English to French, b) French to English:
- a) English to French _____ %
- b) French to English _____ %
26. Does the Board have stenographers capable of preparing the record a) in English, b) in French, c) in both languages?
- a) In English? Yes _____ No _____
- b) In French? Yes _____ No _____
- c) In both languages? Yes _____ No _____

27. (This is a general question inviting comments.)

Does the importance and the generality of the decision to be rendered affect the procedures of the Board in individual hearings? And if so, how does this affect the language practices of the Board and of those appearing before it?

November 8, 1965

Dear Sir:

In the course of the summer of this year you were kind enough to reply to a questionnaire on language practices in hearings conducted by your Board (or Commission), which I sent you on behalf of the Royal Commission on Bilingualism and Biculturalism.

In order to complete our report, we require the following additional information:

1. Does the statute governing your Board (or Commission) contain any provision governing the use of language in hearings before or submissions to you?

Yes _____

No _____

2. Are there any regulations governing the use of language in hearings before or submissions to you?

Yes _____

No _____

3. Has your Board (or Commission) itself issued any rules, regulations or directives governing the use of language in hearings before or submissions to you?

Yes _____

No _____

4. If the answer to the foregoing 3 questions is "no," is the use of language in hearings before or submissions to your Board (or Commission) governed by unwritten custom?

Yes _____

No _____

5. If the answer to questions 1, 2 and 3 is "yes," please enclose a copy of the relevant provisions.

6. Do you have any further comments?

Yours truly

CLAUDE ARMAND SHEPPARD

*This questionnaire was issued in English only.

This appendix contains a brief summary of the relevant portions of an interview conducted on May 26, 1965 by a member of the research staff of the Royal Commission with an official of the Appeals division of the Civil Service Commission.

Under the Civil Service Act* civil servants have a right to appeal against promotions, transfers, suspensions, refusals of increases, or similar decisions that they consider unjust. These appeals must be in writing and are heard by a three-man appeal board composed of Civil Service Commission officers. The appeal boards only make recommendations to the Commission, which makes the final decision except in cases of dismissal. These are decided by the cabinet. Members of the appeal board are *ad hoc* appointees by the Civil Service Commission. The personnel of the appeal board changes. Originally hearings were conducted in the language in which the written appeal came. But, when it was realized that appellants did not always write in the language with which they were more familiar, an effort was made to ascertain in which language the appellant really preferred to have his case heard.

Reports are prepared in the language of the hearing. Quotations from the evidence are in the original language used. The past practice of translating decisions which were rendered in a language different from that of the appellant has been abandoned. When an official needs a copy of the appeal board's report in a different language, an unofficial translation is prepared. Thus serious effort appears to be made to respect the language of the appellant.

The appeal boards hear approximately one thousand appeals a year from all over Canada. Ten to 15 per cent of those emanating from the Ottawa area, where half of Canada's civil servants work, are conducted in French. In the Montreal area, the figure is 90 per cent. Montreal appeals cover the entire province of Quebec. Very few appeals in French are heard from other areas.

* 1960-61 Eliz. II, c.57, s.70.

1. Of the commissioners, officers and members of the administrative organization, please indicate:
- a) The number whose mother tongue is French ()
 - b) The number whose mother tongue is English ()
 - c) The number whose mother tongue is neither English nor French ()
2. Of the commissioners, officers, and members of the administrative organization, please indicate:
- A. The number of those who write French:
- 1. Very well _____
 - 2. Quite well _____
 - 3. With difficulty _____
 - 4. Not at all _____
 - Total ()
- B. The number of those who speak French fluently:
- 1. Very well _____
 - 2. Quite well _____
 - 3. With difficulty _____
 - 4. Not at all _____
 - Total ()
- C. The number of those who write English:
- 1. Very well _____
 - 2. Quite well _____
 - 3. With difficulty _____
 - 4. Not at all _____
 - Total ()

*Both French and English versions of this questionnaire were used.

D. The number of those who speak English fluently:

1. Very well _____
2. Quite well _____
3. With difficulty _____
4. Not at all _____
- Total ()

E. The number of those who speak and understand a language other than French and English:

1. Number _____
2. Please indicate the languages _____

3. Of the employees of your organization please indicate:

- A. The number of those who speak French _____
- B. The number of those who speak English _____
- C. The number of those who speak English and French _____
- Total ()

4. Concerning the languages used in pleadings before your organization please indicate:

- A. The percentage of the written proceedings in French _____ %
- B. The percentage of the written proceedings in English _____ %
- C. The percentage of all pleadings in French _____ %
- D. The percentage of all pleadings in English _____ %
- E. The percentage of pleadings in a language other than French or English _____ %

5. At the inquiry and hearing —

A. Is *French* used by the members of your organization . . .

Often _____
 Seldom _____

B. Is *English* used by the members of your organization . . .

Always _____
 Often _____
 Seldom _____

C. Is *French* used by witnesses . . .

Always _____
 Often _____
 Seldom _____

D. Is *English* used by witnesses . . .

Always _____
 Often _____
 Seldom _____

E. Is a *language other than* English or French used by witnesses . . .

No _____
 Yes _____ If yes please state which languages _____

6. This question concerns interpreters.
- A. Does your organization hire interpreters?

No _____

Yes _____
- B. Do the counsel or representatives of the parties for your organization hire interpreters?

No _____

Yes _____
- C. Please indicate for what percentage of the sessions of your organization translation is necessary:

1. Translation from French to English

_____ %

2. Translation from English to French

_____ %

3. Translation from another language into English or French

_____ %

4. Translation from English or French into another language

_____ %
7. Concerning stenographers, please indicate –
- A. The number of stenographers who are able to take *depositions* in French

- B. The number of stenographers who are able to take *depositions* in English

- C. The number of stenographers who are able to take *depositions* in both languages

8. Concerning the decisions of your organization –
- A. What proportion of these decisions are delivered during a year in French?

_____ %
- B. What is the criterion used for choosing either English or French in rendering the decisions of your organization:

1. The language spoken by the officer rendering a decision?

Yes _____

If yes please state why _____

No _____

2. The language of those to whom the decision is rendered?

Yes _____

If yes please comment _____

No _____

3. Please state other criteria _____
- C. Are your decisions published?

Yes _____

No _____

If yes where _____
- D. What percentage of your decisions rendered in French are translated into English?

_____ %
- E. What percentage of your decisions rendered in English are translated into French?

_____ %

F. Who translates the decisions of your organization?

1. Translators attached to the organization

Yes _____

No _____

2. Translators non-attached to the organization

Yes _____

No _____

3. Members or employees of your organization

Yes _____

No _____

Annex

If your administration has a quasi-judicial function please indicate the conventions, and problems of interpretation concerning:

Written and spoken French:

Written and spoken English:

1. Please indicate the division of your population according to your own statistics:
- a) Those of French origin _____
 - b) Those of English origin _____
 - c) Others _____

2. In the constitution of your municipality, are there any articles which specify situations in which —
- a) It is mandatory to use French? _____ Yes _____ No
 - b) It is mandatory to use English? _____ Yes _____ No
 - c) It is mandatory to use both French and English? _____ Yes _____ No
 - d) It is optional to use either French or English? _____ Yes _____ No
 - e) It is mandatory *or* optional to use a language other than French or English? _____ Yes _____ No
 - f) Citation numbers of these articles: _____
articles _____

3. Are your city by-laws *drafted* —
- a) Sometimes in French? _____ Yes _____ No
 - b) Always in French? _____ Yes _____ No
 - c) Sometimes in English? _____ Yes _____ No
 - d) Always in English? _____ Yes _____ No
 - e) Please indicate why they are drafted in French:

- f) Please indicate why they are drafted in English:

4. Are your city by-laws *published* –
- a) In French only? _____ Yes _____ No
 - b) In English only? _____ Yes _____ No
 - c) Both in French and in English? _____ Yes _____ No
 - d) Both in French and in English on the same page? _____ Yes _____ No

5. In most cases, are your by-laws *translated* –
- a) From French to English? _____ Yes _____ No
 - b) From English to French? _____ Yes _____ No
 - c) From either French or English to another language? _____ Yes _____ No

6. Are public notices and special notices *drafted* –
- a) Either in French or in English? _____ Yes _____ No
 - b) In French only? _____ Yes _____ No
 - c) In English only? _____ Yes _____ No
 - d) Please indicate why they are drafted in French only:

- e) Please indicate why they are drafted in English only:
- _____
- _____

7. Has the Minister of Municipal Affairs authorized the publication of the by-laws, resolutions, notices, ordinances in one language only by a decree or order-in-council?
- a) Yes _____ publication in French
What was the date of the decree? _____
 - b) Yes _____ publication in English
What was the date of the decree? _____
 - c) No _____

8. How often are the notices used by the city written –
- | | Always | Usually | Sometimes | Never |
|--|--------|---------|-----------|-------|
|--|--------|---------|-----------|-------|

9. Are traffic tickets, summonses drafted by your administration –
- a) Both in English and in French? _____ Yes _____ No
 - b) In French only? _____ Yes _____ No
 - c) In English only? _____ Yes _____ No

10. Are the road signs put up by your administration –
- a) Both in French and in English? _____ Yes _____ No
 - b) In French only? _____ Yes _____ No
 - c) In English only? _____ Yes _____ No

11. Are safety signs, for example “défense de fumer” or “no smoking” etc., drafted by your administration for the Fire Prevention Department, Public Services, Construction, etc. —
- a) Both in French *and* in English? _____ Yes _____ No
 - b) In French *or* in English? _____ Yes _____ No
 - c) In French only? _____ Yes _____ No
 - d) In English only? _____ Yes _____ No
12. Do city by-laws provide that permits for construction, for business operations, etc., must be requested —
- a) In French *or* in English? _____ Yes _____ No
 - b) In French *and* in English? _____ Yes _____ No
 - c) In French only? _____ Yes _____ No
 - d) In English only? _____ Yes _____ No
13. Do your city by-laws require publication in newspapers of all requests for tenders for public works —
- a) In French *or* in English? _____ Yes _____ No
 - b) In French *and* in English? _____ Yes _____ No
 - c) In French only? _____ Yes _____ No
 - d) In English only? _____ Yes _____ No
14. Do the regulations permit the bonds or debentures issued by your town to be drawn up —
- a) In French *or* in English? _____ Yes _____ No
 - b) In French *and* in English? _____ Yes _____ No
 - c) In French only? _____ Yes _____ No
 - d) In English only? _____ Yes _____ No
 - e) In any other language? _____ Yes _____ No
 - f) If “yes,” which languages? _____
15. Have you a by-law concerning the choice of names for streets, public places, historical sites?
No _____
Yes _____ (if “yes,” please indicate the provisions concerning language and culture)

16. In the case of difference between French and English texts, do your by-laws contain any rules giving priority to either text?
- a) The French text prevails _____ Yes _____ No
 - b) The English text prevails _____ Yes _____ No
 - c) Most consistent with the by-law _____ Yes _____ No
 - d) Rules of interpretation (please state which ones) _____

17. Does any provision, in your employment specifications, require the use of —
 a) French *or* English? _____ Yes _____ No
 b) Both French *and* English? _____ Yes _____ No
 c) Other languages _____ Yes _____ No
 d) Please give your comments: _____
18. Does your city have a translation office?
 a) No _____ If "no," who prepares the translation? _____
 b) Yes _____ How many translators?
 If "yes" please indicate the type of documents translated:
 Laws _____
 By-laws _____
 Correspondence _____
 Notices _____
 etc. _____
19. In general, is translation made —
 _____ More often from English to French?
 _____ More often from French to English?
 _____ About equally often in each direction?
20. Does your administration have interpreters?
 No _____
 Yes _____ How many interpreters? _____
21. Is it ever necessary to use an interpreter —
 a) In a council meeting?
 No _____
 Yes _____ for translations from French to English
 Yes _____ for translations from English to French
 Yes _____ either for translations of any other language to French or English
 b) In communications with the public?
 No _____
 Yes _____ for translations from French to English
 Yes _____ for translations from English to French
 Yes _____ either for translations of any other language to French or English
22. Are the officers and employees of your administration required to speak one language rather than another?
 Yes _____ French
 Yes _____ English
 Yes _____ Another language: _____
 No _____

23. A. Is the spoken or business language during council meetings generally –

a) French?

Yes

No

b) English?

Yes

No

B. Are the minutes of the Council –

a) In French?

Yes

No

b) In English?

Yes

No

c) In both French and English?

Yes

No
24. A. Of the total correspondence sent to citizens by the city administration over the past year, what percentage would you estimate was sent in French only, in English only, and in both English and French?

a) In French only

%

b) In English only

%

c) In both English and French

%

Total

100%

B. Of the total correspondence sent to the city administration from members of the public during the past year, what percentage would you estimate was in French, in English and in languages other than French or English?

a) In French

%

b) In English

%

c) In languages other than French or English

%

Total

100%
25. Would you please add your comments, your criticism of this questionnaire relatively to the use of the French and English languages. These comments will remain confidential.

1. La Société d'Assurances Générales Acadienne, N.B.S. 1957, c.73.
2. La Caisse Universitaire, N.B.S. 1964, c.79.
3. La Société Nationale L'Assomption, N.B.S. 1952, c.28.
4. The Beauséjour Insurance Company — La Compagnie d'Assurance Beauséjour, N.B.S. 1955, c.82.
5. La Société Nationale des Acadiens, N.B.S. 1959, c.87.
6. Hôpital Jacques Bourgeoys, N.B.S. 1964, c.78.
7. L'Hôpital Stella de Kent, N.B.S. 1964, c.82.
8. Hôpital St-Joseph de Dalhousie, N.B.S. 1960-61, c.102.
9. Grand Falls General Hospital Inc. — L'Hôpital Général de Grand Sault Inc., N.B.S. 1961-62, c.111.
10. Les Missionnaires de Notre-Dame de la Salette, N.B.S. 1952, c.30.
11. Mission La Bonne Nouvelle, N.B.S. 1952, c.32.
12. Les Servantes du Très Saint-Sacrement, Edmunston, N.B.S. 1953, c.36.
13. Les Religieuses Hospitalières de St-Joseph de la Province de Notre-Dame de l'Assomption, N.B.S. 1956, c.74.
14. Les Frères du Sacré-Coeur du Nouveau-Brunswick, N.B.S. 1958, c.67.
15. An Act to incorporate L'Association des Instituteurs Acadiens, N.B.S. 1958, c.70. Section 3(c) provides that one of the objects of the corporation is to strive diligently towards bettering the educational standards of the French-speaking student body, by contributing more efficiently to the solution of the problems inherent to bilingual teaching.
16. L'Association des Commissaires d'Écoles du Comté de Madawaska, N.B.S. 1960, c.121.
17. Le Collège Maris Assumysta de Bathurst, N.B.S. 1964, c.81.
18. Université de Moncton Act, N.B.S. 1963, c.119. Section 7 provides that the university is declared to be a degree-granting French-language institution in New Brunswick, to which, subject to their present charter, the University of Saint Joseph, the Univer-

sité du Sacré-Coeur in Bathurst, and the Université St-Louis in Edmundston will be affiliated for academic purposes, in the form and with the name of colleges.

19. An Act to Incorporate Mission La Bonne Nouvelle, N.B.S. 1952, C.32. The purpose of the corporation is to establish and maintain self-governing French-language Baptist churches and institutions.
20. An Act to Incorporate the New Brunswick Dietetic Association, N.B.S. 1958, c.65. Section 20(2) provides that the designation of members may be in English or French.
21. An Act to Incorporate "L'Association Acadienne d'Éducation," N.B.S. 1952, c.29. Section 4 provides that the objects of the corporation are to encourage and promote better educational facilities in the primary, secondary, and superior stages in respect to the French language, to promote the professional interest of French-speaking teachers, and to organize the French-speaking school trustees and college and university students. Section 5 provides that the corporation may "organize competitions, literary and oratorical contests" among school, college, and university French-speaking students; arrange "for the delivery and holding of lectures, exhibitions, public meetings, classes and conferences calculated directly and indirectly to advance the cause of education whether general, professional or technical amongst the French-speaking population of the Province"; and "further and serve the interests of French-speaking students, school trustees and teachers and endeavour to obtain for them conditions conducive to the improvement of their scholastic and professional life."

1. How many federal-provincial agreements of the following types are presently in force and administered by your Department —
- A. Agreements made by virtue of special federal enabling legislation?
Number: _____
 - B. Agreements made by virtue of the power given to your Department to conclude agreements with the provinces with approval by order-in-council?
Number: _____
 - C. Agreements made by direct negotiation between your Department and provincial departments?
Number: _____
 - D. Other? Number: _____
2. Please state the provinces with which your Department signs the French-language version of agreements as official texts: _____
3. Of the agreements of each type presently in force how many are signed by Quebec in French only, in English only, and in both English and French —
- A. Agreements which involve special federal enabling legislation?
 - Official text in French only Number: _____
 - Official text in English only Number: _____
 - Official texts in both languages Number: _____
 - Total in which Quebec is a party _____
 - B. Agreements approved by order-in-council?
 - Official text in French only Number: _____
 - Official text in English only Number: _____
 - Official texts in both languages Number: _____
 - Total in which Quebec is a party _____

*Both French and English versions of this questionnaire were used.

C. Agreements negotiated directly by your department?

Official text in French only

Number: _____

Official text in English only

Number: _____

Official texts in both languages

Number: _____

Total in which Quebec is a party

D. Other?

Official text in French only

Number: _____

Official text in English only

Number: _____

Official text in both languages

Number: _____

Total in which Quebec is a party

(See Annex.)

4. Are working translations available for current agreements with Quebec where no official text is available in French –

A. Agreements which involve special federal enabling legislation?

_____ Yes – in all cases

_____ Yes – in some cases but not others

_____ No – in no cases

_____ Not applicable: all agreements of this type have official text in French

_____ Not applicable: no agreements of this type with Quebec a party

B. Agreements approved by order-in-council?

_____ Yes – in all cases

_____ Yes – in some cases but not others

_____ No – in no cases

_____ Not applicable: all agreements of this type have official text in French

_____ Not applicable: no agreements of this type with Quebec a party

C. Agreements negotiated directly by your Department?

_____ Yes – in all cases

_____ Yes – in some cases but not others

_____ No – in no cases

_____ Not applicable: all agreements of this type have official text in French

_____ Not applicable: no agreements of this type with Quebec a party

D. Other?

_____ Yes – in all cases

_____ Yes – in some cases but not others

_____ No – in no cases

_____ Not applicable: all agreements of this type have official text in French

_____ Not applicable: no agreements of this type with Quebec a party

5. In cases where official texts are to be signed in French, is it your usual practice to draft the text in French, or to draft it in English and then have it translated –

A. Agreements which involve special federal enabling legislation?

_____ Always drafted in French

_____ Sometimes drafted in French, sometimes in English and translated

- _____ Always drafted in English and translated
_____ Not applicable: no case of this type where official texts are signed in French
- B. Agreements approved by order-in-council?
_____ Always drafted in French
_____ Sometimes drafted in French, sometimes in English and translated
_____ Always drafted in English and translated
_____ Not applicable: no cases of this type where official texts are signed in French
- C. Agreements negotiated directly by your Department?
_____ Always drafted in French
_____ Sometimes drafted in French, sometimes in English and translated
_____ Always drafted in English and translated
_____ Not applicable: no cases of this type where official texts are signed in French
- D. Other?
_____ Always drafted in French
_____ Sometimes drafted in French, sometimes in English and translated
_____ Always drafted in English and translated
_____ Not applicable: no cases of this type where official texts are signed in French
6. A. If there is both an English and a French text of an agreement are they of equal validity? (Please cite governing provisions if any.)
B. In the event of conflict between the English and French texts, how is the conflict resolved? (Please cite governing provisions if any.)
C. In the agreements made by your Department, is it specified what working language or languages are to be used in the administration of the programme? If so, please cite governing provisions.
7. When agreements are made modifying and complementing the basic agreement, is the language of the basic text always used in the modifying agreements, i. e. if the basic agreement is signed in French and English will the modifying agreements always be in French and English?
Yes _____
No _____
- If "no" please state in which agreements the practice varies.

8. This question is purely historical, and does not refer to agreements presently in force. In the space below, please list all *major* federal-provincial agreements in which Quebec has been a party and in which your Department has been involved, between 1910 and the present. Please enter the title of each *major* agreement, the year in which it was signed, and the language of the text which was signed by Quebec.

Title of agreement	Date and reference	Language of text signed by Quebec		
		French	English	Both languages
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				

Annex to Question 3

Please list the agreements of the three types which are *presently* in force and administered by your Department which are signed by Quebec in French only, in English only, in French and English. (If the agreements of any category are too numerous to list, a general description will suffice.)

Title of agreement	Date and reference	Language of text signed by Quebec		
		French only	English only	French & English
A. Agreements which involve special enabling legislation				
B. Agreements approved by order-in-council				
C. Agreements negotiated directly by your Department				
Comments				

The Dominion Bureau of Statistics
The National Energy Board
The Atlantic Development Board
The Central Mortgage and Housing Corporation
The Atomic Energy Control Board
Royal Canadian Mounted Police
Department of Agriculture
Department of Citizenship and Immigration:
 a) Canadian Citizenship Branch
 b) Immigration Branch
 c) Indian Affairs
Department of External Affairs
Department of Fisheries
Department of Forestry
Department of Mines and Technical Surveys
Department of Finance
Department of National Health and Welfare
Department of National Revenue
Department of Northern Affairs and National Resources:
 a) Natural and Historic Resources Branch
 b) Northern Administration Branch
Department of Public Works
Department of National Defence
Department of Trade and Commerce
Department of Transport
Department of Veterans Affairs

Appendix L

Statistical Summary of Replies to Question 1 in Appendix J

Number of federal-provincial agreements in force and administered by the Departments:
(A) by virtue of special federal enabling legislation, (B) approval by order-in-council,
(C) direct negotiations with provincial departments, and (D) other.

	Agreements				Total
	A	B	C	D	
<i>Agencies</i>					
Dominion Bureau of Statistics	—	—	2(Que.)	—	2
Central Mortgage and Housing Corp.	589	—	—	—	589
Atomic Energy Control Board	—	—	2	—	2
Royal Canadian Mounted Police	—	9	61	—	70
Subtotals	589	9	65	—	663
<i>Departments</i>					
Agriculture	3	21	25	—	49
Citizenship and Immigration					
Canadian Citizenship Branch	—	2	—	—	2
Immigration Branch	—	8	13	12	33
Indian Affairs	3	20	—	—	23
External Affairs	2	—	—	—	2
Fisheries	5	—	7	—	12
Forestry	3	4	—	—	7
Mines and Technical Surveys	—	—	7	—	7
Finance	20	—	—	—	20
National Revenue	9	—	—	—	9
Northern Affairs and National Resources					
Natural and Historic Resources Branch	—	—	1	—	1
Northern Administration Branch	2	1	—	—	3
Public Works	11	3	1	—	15
Trade and Commerce	—	—	2	—	2
Transport	—	34	—	—	34
Veterans Affairs	—	22	—	1	23
Subtotal of Departments	58	115	56	13	242
Total	647	124	121	13	905

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Part I

Chapter I-A

1. *Treaty of Peace and Friendship between the most Serene and most Potent Princess Anne . . . and the most Serene and most Potent Prince Lewis The XIVth . . . Concluded at Utrecht the 21 Day of March 1713* (London 1713), 72-3 [in Latin, and English]. The official

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French and Latin versions of Article XII are printed in *Mémoires des Commissaires du Roi et ceux de sa Majesté Britannique, Sur les possessions & les droits respectifs des deux Couronnes en Amérique; avec les Actes publics & Pièces [sic] justificatives* (Paris, 1755), II, 126-7. The Latin, English, and French texts here differ in some relatively minor particulars from the French version quoted by G. Doutre and E. Lareau, *Histoire générale du droit canadien* (Montreal, 1872), I, 246, but these authors do not cite their precise source.

2. J. Murray Beck, *The Government of Nova Scotia* (Toronto 1957), 3.
3. *Ibid.*
4. *Ibid.*
5. Georges Langlois, *Histoire de la population canadienne française* (2nd ed.; Montreal, 1935), 32.
6. Beck, *The Government of Nova Scotia*, 3.
7. *Ibid.*
8. *Ibid.*, 5.
9. *Ibid.*, 6.
10. Langlois, *Histoire de la population canadienne française*, 131.
11. See J.E. Read, "The Early Provincial Constitutions," 26 *Can. Bar Rev.* (1948), 625.
12. (1774) Cowp. 204; Lofft 655.
13. Quoted in Read, "The Early Provincial Constitutions," 622.
14. *Ibid.*, 627. Italics added.
15. 4 Geo. II, c.26, s.15, and quoted in G. E. Taylor, "The Official Language of the Courts in Saskatchewan," 9 *Can. Bar Rev.* (1931), 278-9.
16. Nevertheless, as we shall see, some token attempt has been made in recent years to introduce the occasional use of French in the Nova Scotia legislature.
17. Read, "The Early Provincial Constitutions," 630.
18. *Ibid.*

19. S.N.B. 1861, 24 Vic., c.22.
20. R.S.N.B. 1952, c.74.
21. See section 4.26.

Chapter I-B

22. 30-1 Vic., c.3 (U.K.). Hereafter British North America Act or B.N.A. Act.
23. Quoted in Adam Shortt and Arthur G. Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791* (Canadian Archives, 6-7 Edward VII, Sessional Paper no. 18 [2d ed.; 2 vols.; Ottawa, 1918]), I,5. This essential compilation will be referred to hereafter as *Constitutional Documents*. (Original French: "Que Les habitans soient Conservés dans la possession de leurs maisons, biens, effets et privilèges." "Accordé en mettant les armes Bas." *Ibid.*, 3.)
24. *Ibid.*, 33. (Original French: "Les françois et Canadiens Continueront d'Estre Gouvernés Suivant La Coutume de Paris et les Loix et Usages Etablis pour ce pays; Et Ils ne pourront Estre Assujettis à d'Autres Impots qu'a Ceux qui Estoient Etablis sous la domination françoise." "Ils deviennent Sujets du Roy" *Ibid.*, 20.)
25. *Ibid.*, 34. (Original French: "Les Registres et Autres papiers du Conseil Superieur de Quebec, de la Prevosté Et Amiraute de la même Ville, Ceux des Jurisdiccions Royales des trois Rivières et de Montreal; Ceux des Jurisdiccions Seigneuriales de la Colonie; Les Minutes des Actes des Notaires des Villes et des Campagnes, Et généralement Les Actes & Autres papiers qui peuvent Servir à Justifier L'Estat et la fortune des Citoyens, resteront dans La Colonie dans les Greffes des Jurisdiccions dont Ces papiers dépendent." "Accordé." *Ibid.*, 21.)
26. *Ibid.*, 37. (Original French: "... des paroisses de Berthier et suivantes jusqu'à Kamouraska inclusive." *Ibid.*, 36.)
27. *Ibid.*, 40. (Original French: "... de nommer à tous emplois vacans dans la milice et de débiter par signer des commissions en faveur de Ceux qui en ont dernièrement joui sous Sa Majesté très-Chrétienne." *Ibid.*, 38.)
28. *Ibid.*, 40. (Original French: "Que pour terminer autant qu'il sera possible tous differens qui pourroient survenir entre les habitants à l'amiable, les dits Gouverneurs sont enjoint D'autoriser l'officier de milice Commandant dans chaque paroisse, ou District, d'écouter toutes plaintes, et si elles sont de nature qu'il puisse les terminer, qu'il ait à le faire avec toute La droiture et Justice qu'il convient; S'il n'en peut prononcer pour lors il doit renvoyer les parties devant l'officier des troupes Commandant dans son district, qui sera pareillement autorisé de décider entre eux, si le cas n'est pas assés grave pour exiger qu'il soit remis devant le gouverneur même, qui, dans ce cas comme en tout' autre, fera rendre Justice où elle est due." *Ibid.*, 38-9.)
29. Mason Wade, *The French Canadians* (Toronto, 1955), 50-1.
30. Doutre and Lareau, *Histoire générale du droit canadien*, I, 489.
31. *Ibid.*, 489. (Original French: "La bonne reputation dont vous jouissez me persuade que j'aurais lieu d'être content de vos soins, pour faire régner la paix et l'harmonie dans votre paroisse.")
32. *Ibid.* (Original French: "... suivant les lumières de votre raison et en conscience avec toute la justice et la droiture . . .")
33. *Ibid.*
34. *Ibid.*, 490-1; italics added. (Original French: "... tous appels fait pardevant Nous doivent être rédigés par écrit, et remis *entre les mains de notre secrétaire*; et le jour que nous destinerons à les écouter et déterminer sera publié et affiché. . .")
35. The text is found *ibid.*, 491-2.
36. Their commission is reprinted *ibid.*, 492-3.
37. His commission is reprinted *ibid.*, 493.
38. *Ibid.*
39. *Ibid.*
40. The text of the ordinance is quoted *ibid.*, 503-4.
41. *Ibid.*, 503.

42. *Ibid.*, 517.
43. Original French: "Chacune des chambres aura un écrivain qui sera nommé à cet effet et dont les émoluments seront fixés par nous, et affichés dans l'intérieur de la chambre d'audience. Chaque écrivain aura soin de tenir pour la chambre à laquelle il est attaché un Registre numéroté par première et dernière page et paraphé à chaque page d'un des capitaines de la chambre, dans laquelle seront enregistrés tous les jugements de la dite chambre, et les Ordonnances de Justice et de Police qui seront par nous rendues."
44. *Ibid.*, 510. (Original French: "Vous ferez attention que s'il est ici donné des permissions pour aller dans les paroisses, elles seront données en français et que si les dits *coureurs des côtes* vous produisent une permission en anglais de M. Murray ou de son secrétaire, et que la dite permission soit apostillée de moi pareillement en anglais, cette apostille contient une dépense de trafiquer et non pas une permission.")
45. See André Vachon, *Histoire du notariat canadien* (Quebec, 1962), 54.
46. A.L. Burt, *The Old Province of Quebec* (Minneapolis, 1933), 35.
47. *Constitutional Documents*, I, 99-100; the English text is to be found, 115-16.
48. *Ibid.*, 142; italics added.
49. *Ibid.*, 148.
50. *Ibid.*, 165; italics added.
51. An Act for preventing Dangers which may happen from Popish Recusants, 1673, 25 Car. II, c.2.
52. *Constitutional Documents*, I, 174-5.
53. *Ibid.*, 176-7.
54. *Ibid.*, 191-2.
55. Doutré and Lareau, *Histoire générale du droit canadien*, I, 580.
56. *Constitutional Documents*, I, 207.
57. *Ibid.*, 206.
58. *Ibid.*, 206n2.
59. *Ibid.*, 207n.
60. A.W.P. Buchanan, *The Bench and Bar of Lower Canada down to 1850* (Montreal, 1925), 11.
61. *Constitutional Documents*, I, 208.
62. Buchanan, *The Bench and Bar of Lower Canada*, 11.
63. William Brown and Thomas Gilmore, *Ordinances of the Governor and Council of the Province of Quebec, 1764-67* (Quebec, 1767), 11-12; italics added.
64. G.E. Roy, "L'ancien barreau au Canada," 3 *R.L.* (1897), n.s. 257.
65. Brown and Gilmore, *Ordinances*, 16.
66. André Morel, "La réaction des Canadiens devant l'administration de la justice, de 1764 à 1774," 20 *R. du B.* (1960), 53, 55.
67. Vachon, *Histoire du notariat canadien*, 60-1.
68. Buchanan, *The Bench and Bar of Lower Canada*, 11.
69. Quoted in full in *Constitutional Documents*, I, 212-13.
70. *Ibid.*, 212.
71. *Ibid.*, 214-15.
72. *Ibid.*, 215-16. See also Chapter V of this report.
73. *Ibid.*, 216-19.
74. *Ibid.*, 223-5.
75. Morel, "L'ancien barreau au Canada," 53.
76. 4 Geo. II, c.26.
77. *Constitutional Documents*, I, 231.
78. *Ibid.*, 233.
79. *Ibid.*, 235-6.
80. *Ibid.*, 236.
81. "Report to the Lords of Committee for Plantation Affairs, on Several Papers Relative to Ordinances & Constitutions made by the Governor of Quebec," in *Constitutional Documents*, I, 237-47.

82. *Ibid.*, 241-2.
83. *Ibid.*, 243.
84. *Ibid.*, 246.
85. *Ibid.*
86. *Constitutional Documents*, I, 248.
87. Doutre and Lareau, *Histoire générale du droit canadien*, I, 609.
88. Brown and Gilmore, *Ordinances*, 72-3.
89. *Constitutional Documents*, I, 252.
90. *Ibid.*, 255.
91. *Ibid.*, 256.
92. *Ibid.*, 257.
93. *Ibid.*, 259.
94. *Ibid.*, 261.
95. *Ibid.*, 264.
96. *Ibid.*, 267.
97. *Ibid.*, 268.
98. *Ibid.*, 269.
99. *Ibid.*, 272. (Original French: "... que tous les Sujets en cette province sans aucune Distinction de Religion soient admis à toutes les Charges sans autre Choix, que les talents et le meritte personnel, etre exclus par Etat d'y participer, n'est pas Etre membre de l'estat, s'ils en ressent l'humiliation, ils ne connoissent pas moins le prix d'une grace aussy Distinguée, pour laquelle Ils ne peuvent offrir que des Coeurs pleins d'Amour et de Reconnoissance, Leur Zele, leur attachement et leur fidelité en seront les preuves marquées dans tous les tems a venir." *Ibid.*, 271.)
100. *Ibid.*, 273.
101. *Ibid.*, 274-5.
102. *Ibid.*, 287.
103. *Ibid.*, 284.
104. *Ibid.*, 287-8.
105. *Ibid.*, 288-90.
106. Doutre and Lareau, *Histoire générale du droit canadien*, 620; see also Roy, "L'ancien barreau au Canada," 266-7.
107. *Constitutional Documents*, I, 294.
108. *Ibid.*, 297-8.
109. *Ibid.*, 300.
110. *Ibid.*, 300. The summary of French laws referred to was entitled *Coutumes et usages anciens de la province de Québec*. The more complete compilation of the French law and constitution, represented as in force in Canada before the cession, was prepared partly under the supervision of F.J. Cugnet, and sent to Britain in September 1769. In 1772 several compilations of the French Canadian laws were published, the most important being *An Abstract of those parts of the Custom of the Viscounty and Provostship of Paris which were Received and Practised in the Province of Quebec in the time of the French Government: Drawn up by a select Committee of Canadian Gentlemen well skilled in the laws of France and of that Province by the desire of the Hon. Guy Carleton Esq. Governor in Chief of the said Province* (London, 1772), and François Joseph Cugnet, *An Abstract of the Several Royal Edicts & Declarations and Provincial regulations and ordinances, that were in force in the Province of Quebec in the time of the French Government; and of the Commissions of the several Governors General and Intendants of the same Province during the same period (1772)*.
111. *Ibid.*, 325.
112. *Ibid.*, 327-70.
113. 1 Eliz. I, c.1.
114. *Constitutional Documents*, I, 344.
115. *Ibid.*, 346.

116. *Ibid.*, 347.
117. *Ibid.*, 348-50.
118. *Ibid.*, 351.
119. *Ibid.*, 353.
120. *Ibid.*, 355-6.
121. *Ibid.*, 356-7.
122. *Ibid.*, 361.
123. *Ibid.*, 362-3.
124. *Ibid.*, 370.
125. *Ibid.*, 371.
126. *Ibid.*, 372-3.
127. *Ibid.*, 374.
128. The Earl of Hillsborough, Soame Jenyns, John Roberts, Edward Eliot, William Fitzherbert, Thomas Robinson, and the Earl of Lisburne.
129. *Constitutional Documents*, I, 381-2.
130. *Ibid.*, 383.
131. *Ibid.*, 386.
132. *Ibid.*, 408.
133. *Ibid.*, 415.
134. *Ibid.*, 419-20.
135. *Ibid.*, 424.
136. *Ibid.*
137. *Ibid.*, 425.
138. *Ibid.*, 430.
139. *Ibid.*, 441-2.
140. *Ibid.*, 443-4.
141. *Ibid.*, 445-83.
142. *Ibid.*, 449-50.
143. *Ibid.*, 453-4.
144. *Ibid.*, 461, 481.
145. *Ibid.*, 463.
146. *Ibid.*, 465-6.
147. *Ibid.*, 470.
148. *Ibid.*, 472.
149. Doutré and Lareau, *Histoire générale du droit canadien*, I, 668.
150. *Ibid.*, 699. The position of the British merchants in Quebec was supported by a pamphlet circulated by a group of London merchants trading with Quebec and issued in May 1774; see *Constitutional Documents*, I, 512-22.
151. *Constitutional Documents*, I, 504.
152. *Ibid.*, 567. (Original French: "Enfin un point qui merite attention et qui doit etre fixé, est que la langue françoise etant générale et presque l'unique en Canada, que tout etranger qui y irent, n'aient que ses interets en vue, il est démontré qu'il ne peut les bien servir qu'autant qu'il s'est fortifié dans cette langue, et qu'il est forcé d'en faire un usage continuel dans toutes les affaires particulieres qu'il y traite; qu'il est de plus impossible, vù la distribution des etablissemens et habitations du pais, de pretendre a y introduire jamais la langue angloise comme générale--pour toutes ces raisons et autres non détaillées, il est indispensables d'ordonner que cette langue françoise soit la seule employée dans tout ce qui se traitera et sera arrêté pour toute affaire publique, tant dans les cours de justice, que dans l'assemblée du corps legislatif &c. car il paroitrait cruel que, sans nécessité, l'on voulut réduire presque la totalité des intéressés à n'être jamais au fait de ce qui seroit agité ou seroit arrêté dans le pais." *Ibid.*, 564.)
153. Thomas Chapais, *Cours d'histoire du Canada*, 8 vols. (Quebec, 1919-37), II, 62.
154. *Ibid.*, 60-1.
155. 1774, 14 Geo. III, c.83.

156. It should be noted nevertheless that article X provided for the right to alienate both movable and immovable property including by way of will either according to French law or the laws of England.
157. E.g., W. J. White, *The Sources and Development of the Law of the Province of Quebec* (Montreal, 1903), 17.
158. (1774) Cowp. 204; Lofft 655.
159. Maréchal Nantel, "La langue française au palais," 5 *R. du B.* (1945), 201-16. The case is *R. v. Talon*.
160. *Ibid.*, 204. Maréchal Nantel (205), reports a contrary decision rendered in 1825 by Judge Bowen of the Court of Common Pleas in Kamouraska. He held that a writ of summons drafted in the French was null and void. However, this judgement emanated from a court lower than the Court of King's Bench.
161. Émile Gosselin, "L'administration publique dans un pays bilingue et biculturel," *Canadian Public Administration*, VI (1963), 410-11.
162. Buchanan, *The Bench and Bar of Lower Canada*, 17.
163. *Constitutional Documents*, II, 682-9.
164. This rule was reaffirmed in the ordinance of 1785, 25 Geo. III, c.2, discussed in the next chapter.
165. See section 1.61.
166. It should be noted that the Quebec Code of Civil Procedure provided until 1965 (in what was then article 118) for the use of either French or English in written proceedings. The revised Code, which came into force in September 1966, contains no such provision, perhaps because the right is taken for granted.
167. Doutre and Lareau, *Histoire générale du droit canadien*, I, 716, referring to 17 Geo. III, c.6.
168. 25 Geo. III, c.2; article IX stated that a jury trial could be had at the option of either party in such cases and that decisions were to be made by the agreement of nine out of 12 jurors. The article then dealt with the composition of the jury.
169. 1787, 27 Geo. III, c.4. This ordinance was continued until April 30, 1791, by an ordinance of 1789, 29 Geo. III, c.3.
170. 1787, 27 Geo. III, c.1.
171. Doutre and Lareau, *Histoire générale du droit canadien*, I, 742.
172. Public Archives of Canada (hereafter P.A.C.), Q series, XXIX, Part I, 1.
173. See section 1.73.
174. P.A.C., Q series, XXIX, Part 1, 189-90. (Original French: "Étoit il permis aux différents praticiens de pour suivre et défendre oralement leurs Causes respectives dans la même Langue, en laquelle étoient leur Plaidoyers Ecrit? ou Nonobstant qu'on permettoit aux praticiens Anglois nétoient-ils pas obligés d'en traduire quelques uns, et ne leur a-t-il point été ordonné par la Cour de s'adresser au Siège et aux Praticiens Canadiens en Langue Française, déclarez.")
175. *Ibid.*, 190. (Original French: "Il se remet que Mr de Rouville a prié les Avocats de traduire [sic] leur plaidoyers, comme il n'entendoit pas parfaitement l'Anglois on de repêter en français ce qu'ils avoient dit en Anglois.")
176. *Ibid.*, 192-3.
177. *Ibid.*, XXX, Part II, 417-18.
178. *Ibid.*, 446.
179. *Ibid.*, Part III, 725-6.
180. Hilda M. Neatby, *The Administration of Justice under the Quebec Act* (Minneapolis, 1937), 131.
181. *Ibid.*, 131; see also P.A.C., Q series, XXXII, 363-4.
182. *Ibid.*; see also *ibid.*, XXIX, 807; and XXX, 173.
183. *Ibid.*; a detailed analysis of judicial records from 1775 to 1791 is to be found *ibid.*, 358-65.
184. *Ibid.*, 138.
185. *Ibid.*, 334.
186. Buchanan, *The Bench and Bar of Lower Canada*, 23-4.

187. 1790, 30 Geo. III, c.8.
188. Thomas H. Raddall, *The Path of Destiny: Canada from the British Conquest to Home Rule, 1763 to 1850* (Toronto, 1957), 104-5.
189. Burt, *The Old Province of Quebec*, 486.
190. *Constitutional Documents*, I, 961.
191. 31 Geo. III, c.31.
192. Chapais, *Cours d'histoire du Canada*, II, 48.
193. *Ibid.*
194. *Ibid.*, 49. (Original French: "Malheureusement les représentants de la minorité anglaise ne comprirent pas que les convenances politiques devaient leur faire adopter une attitude d'acquiescement sincère à la situation que leur faisaient les circonstances. Ils ne surent pas discerner que cet acquiescement, hommage à la majorité, serait non seulement un acte de justice, mais de plus un acte d'habileté en vue de l'avenir.")
195. *Ibid.*, 51-2. (Original French: "Je dirai mon sentiment sur la nécessité que l'orateur que nous allons choisir possède et parle également les deux langues. Dans laquelle doit-il s'adresser au gouverneur? Sera-ce dans la langue anglaise ou française? Pour résoudre la question je demande si cette colonie est ou n'est pas une colonie anglaise? Quelle est la langue du souverain et de la législature dont nous tenons la constitution qui nous rassemble aujourd'hui? Quelle [sic] est le langage général de l'empire? Quel est celui d'une partie de nos concitoyens? Et quel sera celui de l'autre et de toute la province en général à une certain époque? Je suis Canadien, fils de Français, ma langue naturelle est la française, car grâce à la division toujours subsistante entre les Canadiens et les Anglais depuis la cession du pays, je n'ai pu savoir qu'imparfaitement la langue de ces derniers. Ainsi mon témoignage n'est pas suspect. . . .
 "Je dirai qu'il y a une nécessité absolue pour les Canadiens d'adopter avec le temps la langue anglaise, seul moyen de dissiper la répugnance et les soupçons que la diversité de langage entretiendra toujours entre deux peuples réunis par les circonstances et forcés de vivre ensemble. Mais en attendant cette heureuse révolution, je crois qu'il est de la décence que l'orateur dont nous ferons le choix puisse s'exprimer dans la langue anglaise lorsqu'il s'adressera au représentant de notre souverain.")
196. *Ibid.*, 53.
197. Papineau's comments as summarized in the *Quebec Gazette*, Dec. 20, 1972.
198. Chapais, *Cours d'histoire du Canada*, II, 54. (Original French: "Trente-deux ans après la conquête, qui pouvait faire craindre notre annihilation, il proclamait avec éclat notre survivance nationale.")
199. *Ibid.*, 55.
200. *Ibid.*, 59; see also section 1.48 of this report.
201. *Ibid.*, 63.
202. *Ibid.*
203. *Journals of the House of Assembly, Lower Canada* (1793), 64.
204. *Ibid.*, 66.
205. *Rules and Regulations of the House of Assembly, Lower Canada* (Quebec, 1793), 40.
206. *Journals of the House of Assembly, Lower Canada* (1793), 142, 144.
207. *Ibid.*, 142.
208. Chapais, *Cours d'histoire du Canada*, II, 67. (Original French: "Le plus grand nombre de nos électeurs étant placés dans une situation particulière, nous sommes obligés de nous écarter des règles ordinaires et de réclamer l'usage d'une langue qui n'est pas celle de l'empire; mais aussi équitable envers les autres que nous espérons qu'on le sera envers nous-mêmes, nous ne voudrions pas que notre langue vînt à bannir celle des autres sujets de Sa Majesté. Nous demandons que l'une et l'autre soient permises.")
209. *Ibid.*, 69. (Original French: "... peut-on croire qu'en nous assurant tous nos droits de citoyens, qu'en nous conservant toutes nos lois de propriété, dont le texte est français, il refuserait de nous entendre quand nous lui parlerons dans cette langue. . . .")

210. *Ibid.* (Original French: "Si nous lisons les débats de la chambre des communes lors de la passation de ce bill, nous en connaissons les raisons. C'est pour que les Canadiens aient le droit de faire leurs lois dans leur langue et suivant leurs usages, leurs préjugés et la situation actuelle de leur pays.")
211. *Ibid.*, 70. (Original French: "Ces Canadiens qui ne parlaient que français ont montré leur attachement à leur souverain de la manière la moins équivoque. Ils ont aidé à défendre toute cette province. Cette ville, ces murailles, cette chambre même où j'ai l'honneur de faire entendre ma voix, ont été en partie sauvées par leur zèle et leur courage. On les a vus se joindre aux fidèles sujets de Sa Majesté et repousser les attaques que des gens qui parlaient bien bon anglais faisaient sur cette ville. Ce n'est donc pas, M. le président, l'uniformité du langage qui rend les peuples plus fidèles ni plus unis entre eux.")
212. *Ibid.*, 70-2.
213. Supplement to the *Quebec Gazette*, Feb. 21, 1793.
214. Chapais, *Cours d'histoire du Canada*, II, 74.
215. *Journals of the House of Assembly, Lower Canada* (1793), 148.
216. *Ibid.*
217. *Constitutional Documents*, I, 105.
218. Chapais, *Cours d'histoire du Canada*, II, 75.
219. *Constitutional Documents*, I, 105.
220. Chapais, *Cours d'histoire du Canada*, II, 76. (Original French: "Notre langue sortait de ce grand débat honorée et fortifiée. Elle avait subi le baptême du feu. Elle s'était affirmée comme langue parlementaire. Elle avait reçu son intronisation officielle. Et l'ardeur de la bataille qui s'était terminée par sa victoire donnait à celle-ci plus de rayonnement et plus d'éclat.")
221. Richardson to Alexander Ellice, dated Montreal, February 16, 1793, quoted by W. P. M. Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution, 1713 to 1929* (Toronto, 1930), 213.
222. Chapais, *Cours d'histoire du Canada*, II, 78.
223. *Ibid.*, 80.
224. *Ibid.*, 81.
225. S.L.C. 1793, 34 Geo. III, c.1. This Act was entitled an Act to Provide for the Publication of Certain Laws, and for the Printing and Distributing to Certain Persons, for the Purpose of Public Information, all Laws That Have Been, and Shall Be Passed in the Legislature of This Province, under the Present Constitution.
226. S.L.C. 1796, 36 Geo. III, c.9.
227. S.L.C. 1803, 43 Geo. III, c.4.
228. In an Act for the Better Regulation of the Militia of this Province and for Repealing Certain Acts or Ordinances Therein-Mentioned, S.L.C. 1803, 43 Geo. III, c.1, s.35.
229. An Act for the Division of the Province of Lower Canada, for Amending the Judicature thereof, and for Repealing Certain Laws Therein Mentioned, S.L.C. 1793, 34 Geo. III, c.6, s.29.
230. Buchanan, *The Bench and Bar of Lower Canada*, 38.
231. By an Act to Amend certain Forms of Proceeding in the Courts of Civil Jurisdiction in this Province and to Facilitate the Administration of Justice, S.L.C. 1801, 41 Geo. III, c.7, s.1.
232. See section 1.70.
233. An Act to Repeal Certain Parts of an Act Passed in the Fourteenth Year of His Majesty's Reign, Entitled, "An Act Making More Effectual Provision for the Government of the Province of Quebec in North America and to Introduce the English Law as the Rule of Decision in All Matters of Controversy, Relative to Property and Civil Rights," S.U.C. 1792, 32 Geo. III, c.1, s.1.
234. An Act to Establish Trials by Jury, S.U.C. 1792, 32 Geo. III, c.2.
235. See section 5.03.
236. An Act to Establish a Superior Court of Civil and Criminal Jurisdiction, and to Regulate the Court of Appeal, S.U.C. 1794, 34 Geo. III, c.2.

237. 1792, 32 Geo. III, c.1.
238. 1731, 4 Geo. II, c.26.
239. *Journal of the House of Assembly of Upper Canada* (1793), Ontario Archives (1909), 23. Quoted in Harold Lande, "Economic Factors Affecting the Trend of Language in the Province of Quebec" (unpublished thesis, Law Faculty, McGill University, 1930).
240. In a letter dated November 1, 1965, replying to my query, Mr. D.F. McOuat, Archivist for Ontario, wrote: "We have never seen official copies of the Statutes or Proceedings of the Legislative Assembly of Upper Canada printed in the French language. I have noted your reference to a resolution passed by the Legislative Assembly on 3 June 1793 but I have been unable to find what action was taken subsequently."
241. Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution*, 243-8.
242. Hermas Bastien, *Le bilinguisme au Canada* (Montreal, 1938), 17.
243. 1838, 1 Vic., c.9, s.2, amended by 1839, 2-3 Vic., c.3, increasing the powers of the Council.
244. These rules and orders are apparently unpublished and have been examined by us in a photo-static copy made by the Archives.
245. Publication in the *Gazette* was required by 1839, 2-3 Vic., c.53, s.5, which made no mention of language.
246. Stephen Leacock, *Canada, the Foundation of the Future* (Montreal, 1941), 39.
247. The text we have consulted is that published in *Lord Durham's Report*, ed. C.P. Lucas, 3 vols. (Oxford, 1912).
248. *Lord Durham's Report*, II, 40-1.
249. *Ibid.*, 63.
250. *Ibid.*, 72.
251. *Ibid.*, 288-9.
252. *Ibid.*, 305.
253. F. Bradshaw, *Self-Government in Canada and How It Was Achieved: The Story of Lord Durham's Report* (Toronto, 1910), 340-1.
254. *Ibid.*, 341.
255. D. Hugh Gillis, *Democracy in the Canadas, 1769 to 1867* (Toronto, 1951), 163.
256. 3-4 Vic., c.35.
257. S.C. 1841, 4-5 Vic., c.11. In answer to our question as to the translation of laws applicable only to Canada West between the years 1841 and 1847, Mr. William P. Irvine replied as follows: "I compared the English and French volumes of the laws adopted in each of these years, and found them to be absolutely identical with respect to content. This means that not only were translations made of those laws of the British Parliament applicable to all the colonies, and the laws of the Canadian legislature applicable to the whole territory, but also that they were made of all public and private legislation dealing with Upper Canada (this term was preferred to Canada West in the legislation). The following list of French titles will give you some flavour of what was translated. Many more examples could equally well have been chosen.

Year	Chap.	Title
1841	II	Acte pour amender les Lois de Milice de cette partie de la Province ci-devant la Province du Haut Canada.
	X	Acte pour mieux pourvoir au Gouvernement intérieur de cette partie de la Province qui constituait ci-devant la Province du Haut Canada par l'établissement d'autorités locales ou municipales en icelle.
	LXXI	Acte pour autoriser le paiement d'une certaine somme d'argent à Christopher Leggo [a resident of Brockville].
1842	XXI	Acte pour changer le lieu du Bureau d'Enregistrement pour le Comté de Middlesex.
1843	XXIX	Acte pour l'établissement et soutien des Écoles Communes dans le Haut Canada.

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|--------|--------|--|
| 1844-5 | XXIV | Acte pour incorporer le Bureau de Commerce de la Cité de Toronto. |
| | LXXXII | Acte pour incorporer les Évêques Catholiques Romains de Toronto et de Kingston, en Canada, dans chaque Diocèse. |
| 1846 | XII | Acte pour remédier à certaines défectuosités dans l'Enregistrement des Titres dans le Comté de Hastings dans le Haut Canada. |
| | LI | Acte pour changer le mode des cotisations dans les villes de Niagara et de Queenston. |
| | XCIV | Acte pour incorporer la Compagnie ed Manufacture de Cobourg. |
| | CII | Acte pour le soulagement de John Macara, Écuyer, de la Cité de Toronto. |

"Your contention that Ontario has already been bilingual for twenty-six years of its earlier life would seem amply borne out."

258. *Papiers Parlementaires, Conseil Législatif de la Province du Canada* (1841), vol. I, appendice 1, Règles et règlements pour la conduite de l'Assemblée Législative.
259. S.C. 1843, 7 Vic., c. 19.
260. These reports are reprinted in full in the Prefatory Notice to *The Revised Acts and Ordinances of Lower Canada* (Montreal, 1845), iii and iv.
261. *Ibid.*, vi.
262. *Ibid.*, ix.
263. *Ibid.*, x, xi.
264. S.C. 1844-5, 7-8 Vic., c.68.
265. This act also repealed the following acts of the Lower Canada Assembly, which had provided for the printing and distribution of statutes: S.L.C. 1832, 2 Will. IV, c.33; S.L.C. 1794, 34 Geo. III, c.1; S.L.C. 1803, 43 Geo. III, c.4, s.2 and the Act of the Upper Canada Assembly 1804, 44 Geo. III, c.5.
266. An Act for Making, Repairing and Altering the Highways and Bridges within this Province, and for Other Purposes, R.A.O.L.C. 1845, which repeated the terms of the Lower Canada Statute of 1796, 36 Geo. III, c.9, and An Act for the More Ample Publication of Certain Acts of the Provincial Parliament, R.A.O.L.C. 1845, Class K, which repeated the Lower Canada Statute of 1803, 43 Geo. III, c.4 (see section 1.92).
267. Quoted in Wilfrid Morin, *L'indépendance du Québec* (Montreal, 1938), 155. (Original French: "On me demande de prononcer dans une autre langue que ma langue maternelle le premier discours que j'ai à prononcer dans cette Chambre. Je me méfie de mes forces à parler la langue anglaise. Mais je dois informer les honorables membres que quand même la connaissance de la langue anglaise me serait aussi familière que celle de la langue française, je n'en ferais pas moins mon premier discours, dans la langue de mes compatriotes canadiens-français, ne fût-ce que pour protester solennellement contre cette cruelle injustice de l'Acte d'Union qui proscriit la langue maternelle d'une moitié de la population du Canada. Je le dois à mes compatriotes, je me le dois à moi-même.")
268. Bastien, *Le bilinguisme au Canada*, 18.
269. *Ibid.*
270. 1848, 11-12 Vic., c.56 (U.K.).
271. Bastien, *Le bilinguisme au Canada*, 19.
272. Gosselin, "L'administration publique dans un pays bilingue et biculturel," 412.
273. 1849, 12 Vic., c.27.
274. *Ibid.*, s.47; italics added.
275. 1859 C.S.C., c.6, s.57.
276. An Act to Repeal Part of the Act Therein Mentioned, Relative to the Printing and Distribution of the Provincial Statutes, S.P.C. 1851, 14-15 Vic., c.81; An Act Respecting the Provincial Statutes, C.S.C. 1859, c.5, ss.8, 13; An Act Respecting Commissioners' Courts for the Summary Trial of Small Causes, C.S.L.C. 1861, c.94, s.47, which repeated S.P.C. 1843, 7 Vic., c.19, s.41; An Act Respecting Municipalities and Roads in Lower Canada, C.S.L.C. 1861, c.24, s.70, and S.P.C. 1860, 23 Vic., c.61; An Act to Amend the Municipal Act of Lower Canada, S.P.C. 1866, 29-30 Vic., c.32, ss.7, 8, 10, 11.

277. See section 1.94.
278. S.P.C. 1859, 22 Vic., c.30.
279. S.P.C. 1857, 20 Vic., c.43.
280. Civil Code of Quebec, 1866, Preface.
281. S.P.C. 1841, 4-5 Vic., c.20.
282. See section 1.70.
283. An Act to Repeal Certain Acts and Ordinances Therein Mentioned, and to Make Better Provision for the Administration of Justice in Lower Canada, S.P.C. 1843, 7 Vic., c.16, s.28.
284. An Act for the Establishment of a Better Court of Appeals in Lower Canada, S.P.C. 1843, 7 Vic., c.18, s.10, and reference should also be had to An Act Respecting Commissioners' Court for the Summary Trial of Small Causes, S.P.C. 1843, 7 Vic., c.19, s.11.
285. S.P.C. 1846, 9 Vic., c.29, s.1.
286. S.P.C. 1849, 12 Vic., c.37, s.1, which was repeated as section 28 of an Act respecting the Court of Queen's Bench, C.S.L.C. 1861, c.77.
287. S.P.C. 1849, 12 Vic., c.38, ss.19, 51, repeated in C.S.L.C. 1861, c.83.
288. *Ibid.*, s.94.
289. S.P.C. 1849, 12 Vic., c.38, s.36, repeated in 14-15 Vic., c.89, s.4, and carried into C.S.L.C. 1861, c.8, s.36.
290. *Ibid.*, s.158(1) first enacted as 1855, 18 Vic., c.109, s.1.
291. 1855, 18 Vic., c.104, s.1.
292. S.P.C. 1849, 12 Vic., c.46, s.26.
293. S.P.C. 1847, 10-11 Vic., c.13, s.23.
294. S.P.C. 1851, 14-15 Vic., c.89.
295. *Lord Durham's Report*, II, 126.
296. *Ibid.*, 126-9.
297. *Ibid.*, s.3(6).
298. *Ibid.*, s.4(7).
299. C.S.L.C. 1861, c.84.
300. S.P.C. 1864, 27-8 Vic., c.41.
301. "129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act."
302. See section 5.02.
303. S.P.C. 1864, 27-8 Vic., c.41.
304. See sections 5.17 to 5.20.
305. See section 9.02.
306. Maurice Ollivier, *British North America Acts and Selected Statutes, 1867-1962* (Ottawa, 1962), 46; see p. 57 for London Resolution 45. For Quebec Resolution 46 see also Journal of the Legislative Assembly of Canada, 1865, in *Documents Illustrative of the Canadian Constitution*, ed. by William Houston (Toronto, 1891), 202-9 and Minutes of the Proceedings in Conference of the Delegates from the Provinces of British North America, October 1864, Conference Chamber, Parliament House, Quebec, Wednesday, October 26, 1864, in Joseph Pope, *Confederation* (Toronto, 1895), 1-38.
307. *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada* (Quebec, 1865), 779; hereafter referred to as *Confederation Debates*. In spite of diligent research it has been impossible to establish the original language of the collected speeches which were published in separate

- English and French editions in 1865. Nevertheless it is reasonable to suppose that all the English-speaking members spoke in English. As to the Francophones, one can only guess. We have therefore reproduced the English texts of both Anglophones and Francophones as published in the *Confederation Debates*. The French edition is entitled *Débats parlementaires sur la question de la confédération des provinces de l'Amérique Britannique du Nord, 3e Session, 8e Parlement provincial du Canada* (Quebec, 1865). Neither edition indicates which speeches are translated. All our references are to the English edition of the debates.
308. *Ibid.*, 780.
 309. *Ibid.*, 780-1.
 310. *Ibid.*, 782.
 311. *Ibid.*
 312. *Ibid.*, 782-3.
 313. *Ibid.*, 786.
 314. *Ibid.*
 315. *Ibid.*, 787.
 316. *Ibid.*, 944.
 317. *Ibid.*
 318. *Ibid.*
 319. *Ibid.*, 945.
 320. *Ibid.*; italics added.
 321. *Ibid.*, 950.
 322. 1867, 30-1 Vic., c.3.
 323. See Pope, *Confederation*, 98-131, for versions of all five drafts.
 324. Chapais, *Cours d'histoire du Canada*, VIII, 161. (Original French: "Depuis la conquête, c'est la première fois que notre langue reçoit une telle sanction constitutionnelle. En 1763, le traité de Versailles reste muet sur ce point, pourtant si grave. En 1774, l'Acte de Québec le laisse également dans l'ombre. En 1791, la constitution dont William Pitt est le promoteur ne contient rien au sujet de la langue. Et si un *modus vivendi* plutôt satisfaisant s'établit à la suite du grand débat de 1793, ce n'est pas là une reconnaissance des droits légaux du français. En 1840, sombre année, notre idiome est formellement pros crit par la constitution qu'on nous impose. Sans doute, en 1848, cet article odieux est révoqué par le parlement britannique et notre législature recouvre sur ce point sa liberté d'action. Mais ce n'est pas encore la promulgation d'un droit constitutionnel. Tandis qu'en 1864 et en 1867 la langue française est proclamée langue officielle, et obligatoire pour la publication des procès-verbaux, des journaux parlementaires, des documents et des actes législatifs. C'était, sans contredit, une grande victoire nationale.")
 325. 22 Geo. V, c.4.
 326. 1865, 28-9 Vic., c.63.
 327. 1949, 13 Geo. VI, c.81.

Chapter I-C

328. 31-2 Vic., c.104.
329. These acts were: 1869, 32-3 Vic., c.3; 1870, 33 Vic., c.3; 1871, 34 Vic., c.16; 36 Vic., c.5.
330. E. H. Oliver, *The Canadian North-West: Its Early Development and Legislative Records* ("Publications of the Canadian Archives," 9, 2 vols. (Ottawa, 1914-15), I, 21.
331. *Ibid.*, I, 150.
332. An Act for Extending the Jurisdiction of the Courts and Justice in the Provinces of Lower and Upper Canada to the Trial and Punishment of Persons Guilty of Crimes and Offences within Certain Parts of North America, Adjoining to the Said Provinces, 1803, 43 Geo. III, c.138.
333. An Act Regulating the Fur Trade and Establishing a Commercial and Civil Jurisdiction within Certain Parts of North America, 1821, 1-2 Geo. IV, c.66.
334. "Criminal Jurisdiction in the Northwest Territory," an unsigned editorial comment in 21 *Canada Law Journal* (1885), 246.

335. Oliver, *The Canadian North-West*, II, 1285.
336. *Ibid.*, I, 184; italics added.
337. *Ibid.*, 179.
338. *Ibid.*, 186.
339. *Ibid.*, 33.
340. *Ibid.*, 326; italics added.
341. *Ibid.*, 367-8; italics added.
342. Smith to Thom, March 29, 1851, *ibid.*, 368.
343. Oliver, *The Canadian North-West*, II, 1317; italics added.
344. *Ibid.*, I, 352; italics added.
345. *Ibid.*, 378; the judges were Pascal Berland, Urbain Delorme, Joseph Guilbeau, François Bruneau, and Maximilien Genton.
346. *Ibid.*
347. An Act for enabling Her Majesty to accept the Surrender upon Terms of the Lands, Privileges and Rights of "The Governor and Company of Adventurers of England trading in to Hudson's Bay" and for admitting the same into the Dominion of Canada, 1868, 31-2 Vic., c.105.
348. 32-3 Vic., c.3.
349. Oliver, *The Canadian North-West*, II, 904-6.
350. Quoted by L. H. Thomas, in *The Struggle for Responsible Government in the North-West Territories, 1870-97* (Toronto, 1956), 36.
351. S.C. 1870, 33 Vic., c.3.
352. An Act respecting the establishment of Provinces in the Dominion of Canada, 1871, 34-5 Vic., c.28.
353. S.M. 1873, 36 Vic., c.24, repeated in S.M. 1875, 38 Vic., c.31, s.2.
354. S.M. 1875, 38 Vic., c.41.
355. S.M. 1879, 42 Vic., c. 3, ss.195, 196.
356. An Act to Consolidate and Amend the Several Acts of Incorporation of the City of Winnipeg, S.M. 1884, 47 Vic., c.78, s.95.
357. S.M. 1875, 38 Vic., c.2.
358. This provision was repeated in The Election Act of Manitoba, S.M. 1886, 49 Vic., c.29, s.68.
359. S.M. 1872, 35 Vic., c.6, s.9.
360. S.M. 1873, 36 Vic., c.23, s.3.
361. An Act to Amend the Act 34 Vict., cap. 30 Intituled: "An Act Concerning Stray Animals," S.M. 1875, 38 Vic., c.32, s.1.
362. S.M. 1870, 34 Vic., c.14.
363. See sections 5.09, 5.12, and 5.13.
364. S.M. 1872, 35 Vic., c.3, s.4.
365. An Act respecting Aliens, S.M. 1873, 37 Vic., c.43, s.2(1).
366. An Act respecting Jurors and Juries, S.M. 1876, 39 Vic., c.3, s.36.
367. *Ibid.*, s.37.
368. S.M. 1877, 40 Vic., c.18; S.M. 1881, 44 Vic., c.28; S.M. 1883, 46-7 Vic., c.1, part III; S.M. 1884, 47 Vic., c.4; and S.M. 1885, 48 Vic., c.17.
369. In sections 5.09, 5.12, and 5.13.
370. M.S. Donnelly, *The Government of Manitoba* (Toronto, 1963), 78.
371. *Ibid.*, 36.
372. S.M. 1890, 53 Vic., c.14.
373. See section 2.05.
374. Canada, House of Commons, *Debates* (March 6, 1893), 1766.
375. George M. Weir, *The Evolution of Separate School Law in the Prairie Provinces* (n.p., n.d.), 47.
376. 926/16 Chambers.
377. S.M. 1895, 58-9 Vic., c.6, s.491.
378. S.M. 1891, 49 Vic., c.29, s.18.
379. S.M. 1881, 44 Vic., c.15, s.2.

380. An Act to amend "An Act to authorize the changing of the names of Incorporated Companies," S.M. 1898, 61 Vic., c.8, s.2.
381. An Act to amend "An Act respecting the Election of Members of the Legislative Assembly," S.M. 1900, 63-4 Vic., c.11, s.1(2).
382. S.C. 1869, 32-3 Vic., c.3.
383. D.C. Williams, "Law and Institutions in the Northwest Territories," 28 *Sask. Bar Rev.* (Sept. 1963), 109 at 112.
384. Oliver, *The Canadian North-West*, II, 1007.
385. *Ibid.*, 1009-10.
386. *Ibid.*, 1011.
387. D.C. Williams, "Law and Institutions in the Northwest Territories" 29 *Sask. Bar Rev.* (Sept. 1964), 86.
388. Oliver, *The Canadian North-West*, II, 1028.
389. *Ibid.*, 1032-3.
390. An Act to amend and consolidate the Laws respecting the North-West Territories, S.C. 1875, 38 Vic., c.49 (hereafter North-West Territories Act, 1875). Although the Act was assented to on April 8, 1875, it was not proclaimed until October 7, 1876.
391. By an Act to amend the North-West Territories Act, S.C. 1877, 40 Vic., c.7.
392. Canada, House of Commons *Debates* (1877), p.1872, quoted in Thomas, *The Struggle for Responsible Government in the Northwest Territories*, 78.
393. S.C. 1880, 43 Vic., c.25, s.94.
394. R.S.C. 1886, c.50, s.110.
395. *Ordonnances des Territoires du Nord-Ouest, 1878* (Battleford, P.G. Laurie, 1879).
396. *Ordinances of the North-West Territories, 1878* (Regina, Nicholas Flood Davin, Queen's Printer to Government of Northwest Territories, 1884).
397. See section 1.146.
398. The School Ordinance of 1884, s.41 of which stated that the Proclamation of the Lieutenant-Governor electing any district into a school district shall be printed and posted "in both the French and English languages."
399. An Ordinance Respecting Trespassing and Straying Animals, s.9(2); italics added.
400. Proclamation Relating to Electoral Districts and Elections in the North-West Territories, 1881, s.34; and the School Ordinance, 1884, s.17(4) and (6).
401. Taylor, "The Official Language of the Courts in Saskatchewan," 277.
402. No. 6 of 1893. This ordinance was redrafted in the Consolidated Ordinances, 1898.
403. This came into force on January 1, 1894. It became s.21 of the Judicature Ordinance in C.O.N.W.T. 1898, c.21, s.21.
404. S.Q. 51-2 Vic., 1888, c.13.
405. Thomas, *The Struggle for Responsible Government in the North-West Territories*, 185.
406. See section 1.136.
407. Canada, House of Commons, *Debates* (1890), col. 598.
408. *Ibid.*, col. 1017.
409. Thomas, *The Struggle for Responsible Government in the North-West Territories*, 187.
410. S.C. 1891, 54-5 Vic., c.22, s.18; italics added.
411. *Journal of the North-West Territories* (1891-2) 110.
412. No. 11 of 1897, C.O.N.W.T. 1898, c.3, s.47.
413. No. 9 of 1898, s.38(34).
414. For example, An Ordinance to Incorporate "Les Soeurs de Charité de la Providence des Territoires du Nord Ouest," N.W.T.O. 1902, c.13.
415. This proclamation is found as an annex to the Yukon Territory Act, S.C. 1898, 61 Vic., c.6.
416. The current Yukon Act, 1952-3, 1-2 Eliz. II, c.53, s.22, still provides that the laws relating to civil and criminal matters and the ordinances in force in the Northwest Territories on June 13, 1898, "shall be and remain in force in the Territory, in so far as the same are applicable

thereto, and in so far as the same have not been or are not hereafter repealed, abolished or altered by the Parliament of Canada, or by any ordinance.”

417. In section 1.146f.
418. See section 1.147.
419. See section 4.16 (f) and (g).
420. C.O.Y.T. 1902, c.3, s.41.
421. The Judicature Ordinance, C.O.Y.T. 1902, c.17, R.539 and 626.
422. S.C. 1905, 4-5 Ed. VII, c.3.
423. S.C. 1905, 4-5 Ed. VII, c.42.
424. *Revised Statutes of Canada* (1906), IV, 2961.
425. S.C. 1907, 6-7 Ed. VII, c.44; see section 1.146.
426. *Alberta legislation concerning courts*: the Supreme Court Act, S.A. 1907, 7 Ed. VII, c.3; the Judicature Acts, S.A. 1919, 9 Geo. V, c.3; R.S.A. 1922, c.72; R.S.A. 1942, c.129; R.S.A. 1955, c.164. *Alberta legislation concerning the Legislative Assembly*: an Act respecting the Legislative Assembly of Alberta, S.A. 1909, 9 Ed. VII, c.2.; the Legislative Assembly Acts, R.S.A. 1922, c.3; R.S.A. 1955, c.174; and subsequent amendments. *Saskatchewan legislation concerning courts*: the Judicature Act, S.S. 1907, 7 Ed. VII, c.8; the Judicature Act, R.S.S. 1909, c.52; superseded by the Court of King’s Bench Act, S.S. 1915, 6 Geo. V, c.10; and R.S.S. 1920, c.39; R.S.S. 1930, c.49; R.S.S. 1940, c.61; the Court of Appeal Act, S.S. 1915, 6 Geo. V, c.9; and R.S.S. 1920, c.38; and R.S.S. 1930, c.48; R.S.S. 1940 c.60; S.S. 1942, 6 Geo. VI, c.11; R.S.S. 1953, c.66. *Saskatchewan legislation concerning the Legislative Assembly*: The Legislative Assembly Acts, S.S. 1906, 6 Ed. VII, c.4; R.S.S. 1909, c.2; R.S.S. 1920, c.2; R.S.S. 1930, c.3; superseded by S.S. 1938, 2 Geo. VI, c.4; R.S.S. 1940, c.3; R.S.S. 1953, c.3.
427. Elmer A. Driedger, *The Composition of Legislation* (Ottawa, Queen’s Printer, 1957), 135.
428. *Strachan v. Lamont* (1906) W.L.R. 570.
429. *Ibid.*, 574.
430. An Act respecting the Legislative Assembly of Saskatchewan, S.S. 1906, 6 Ed. VII, c.4; an Act respecting the Legislative Assembly of Alberta, S.A. 1909, 9 Ed. VII, c.2.
431. See sections 13.11 (b) and 13.21 (b).
432. S.S. 1907, 7 Ed. VII, c.8.
433. S.A. 1907, 7 Ed. VII, c.3.
434. Taylor, “The Official Language of the Courts in Saskatchewan,” 282.
435. (1965) 52 W.W.R. 32, also reported at [1965] 51 D.L.R. (2d) 724.
436. (1965) 52 W.W.R. 32 at 44.
437. Consolidated Rules of Supreme Court of Alberta, 1962, rule 330; Revised Rules of Court of Saskatchewan, 1961, rule 293.
438. R.S.A. 1955, c.16.
439. S.A. 1958, c.32.
440. (1965) 52 W.W.R. 32 at 46; also reported at [1965] 51 D.L.R. (2d) 724.
441. 1803, 43 Geo. III, c.138, and 1821, 1-2 Geo. IV, c.66.
442. 1849, 12-13 Vic., c.48.
443. 21-2 Vic., c.99.
444. 29-30 Vic., c.67.
445. 34-5 Vic., c.28.
446. Pursuant to the Act of 1731, 4 Geo. 11, c.26, discussed in section 1.05.

Chapter I-D

447. *Constitutional Documents*, I, 5n.
448. Published by the Queen’s Printer for Lower Canada, 1797, by order of the Governor.
449. *Constitutional Documents*, I, 7.
450. *Ibid.*, 97, 113.

451. Published by order of the Governor, by P.E. Desbarats, Law Printer, 1824; French and English texts are on opposite pages.
452. 14 Geo. III, c.83.
453. 31 Geo. III, c.31.
454. *Constitutional Documents*, II, 1.
455. 11 Geo. IV and I Will. IV, c.53.
456. 3-4 Vic., c.35.
457. 11-12 Vic., c.56.
458. 28-9 Vic., c.63.
459. Ollivier, *British North America Acts*.

Part 2

Chapter II

1. 13 Geo. VI, c.81, s.1 (U.K.). See section 1.115 for the history of this amendment.
2. See sections 3.16 to 3.38.
3. For evidence that much federal subordinate legislation is unilingually English, see sections 3.23, n.41 and 3.29. The opposite situation obtains in Quebec: see section 3.38.
4. Respectively in sections 4.16 and 4.17.
5. See sections 4.21 to 4.28 for a discussion of the problem of court interpreters, 4.29 to 4.32 for court stenographers, and 4.34 to 4.38 for some of our conclusions and recommendations.
6. See Chapter V for a full discussion.
7. Federal quasi-judicial tribunals are discussed in Chapter VI and Quebec quasi-judicial boards and commissions in Chapter VII. For an analysis of their constitutional position, see sections 6.02 (federal boards) and 7.02 (Quebec boards).
8. See Chapter IX for a detailed study of the subject.
9. See section 8.03.
10. See sections 4.21 to 4.28.
11. See Chapter V.
12. See section 7.04.
13. See section 8.03.
14. See sections 8.05 and 8.07.
15. See section 8.16.
16. See section 8.22.
17. See sections 9.03 to 9.07.
18. See section 9.08.
19. See sections 9.09 and 9.10.
20. See section 9.11.
21. See Chapter X.
22. See sections 3.41 and 3.46.
23. See sections 12.24 to 12.26.
24. Under section 92 (1) of the B.N.A. Act the provinces have always possessed the right to amend their own constitutions, except for the office of Lieutenant-Governor and some limitations in section 80 (dealing with electoral districts in Quebec's Eastern Townships) and section 93 (education).
25. See Bora Laskin, *Canadian Constitutional Law* (3d ed.; Toronto, 1966), 103-4.
26. This will appear abundantly in Chapter XIII (dealing with the official status of languages in the various provincial, territorial and federal jurisdictions).
27. [1883-4] 9 A.C. 117 at 133.
28. The Second Schedule lists the following electoral districts: Argenteuil, Brome, Compton, Huntingdon, Megantic, Missisquoi, Ottawa, Pontiac, Shefford, Town of Sherbrooke, Stanstead, Wolfe, and Richmond.

29. We shall see in section 4.38 that the proportion of English population in these districts now does not even reach 20 per cent.
30. See sections 1.132 to 1.138.
31. S.C. 1870, 33 Vic., c.3.
32. 34-5 Vic., c.28 (U.K.).
33. An Act to provide that the English Language shall be the official language of the Province of Manitoba, S.M. 1890, 53 Vic., c.14.

Part 3

Chapter III

1. We have seen in sections 1.147, 1.149, and 1.150 that French might also still be an official language in the Northwest Territories and the Yukon. Nor is the situation clear in Alberta and Saskatchewan: see sections 1.153 to 1.155.

Chapter III-A

2. Found in Arthur Beauchesne, *Rules and Forms of the House of Commons of Canada* (4th ed.; Toronto, 1958), 263.
3. The main authority for all of this section is the Preface in Elmer A. Driedger's *The Composition of Legislation* (Ottawa, 1957), xi-xxiii.
4. See also Elmer A. Driedger, "The Preparation of Legislation," 31 *Can. Bar Rev.* (1953), 33 at 48.
5. This branch is situated in the office of the Parliamentary Counsel in the House of Commons. It is a branch of the Bureau for Translations created in 1934 by the Bureau for Translations Act, R.S.C. 1952, c.270, one of whose functions is to translate bills and statutes (sections 3 and 4).
6. See sections 4.09 to 4.11.
7. Various other officials indicated to us that they feel that the drafting can be done in only one language. As will be seen in section 3.26 many of the officials queried about subordinate legislation stated that they considered simultaneous drafting in both languages a practical impossibility. In fact, even Quebec seems to draft most of its statutes in French and to translate only near the end of the drafting process (section 3.13).
8. (Ottawa, 1963), III, 103.
9. This review of the operations of the Bureau for Translations is based on interviews with two officials closely connected with it.
10. In "De la technique législative," 1 *R. du D.* (1922-3), 355, reprinted in *Le Devoir* (Montreal), April 17, 1965, 5. (Original French: "Avec des mots français ils font des lois anglaises.")
11. *Ibid.* (Original French: "Le développement qu'un Anglais, par exemple, aime à faire d'une idée ne ressemble guère à ce qu'il plairait à un Français d'en tirer. La mentalité, la tournure d'esprit, la méthode sont différentes. On peut avoir pris possession de l'idée d'une loi telle qu'exprimée dans une langue, et ne pouvoir la rendre que fort mal dans une autre. À moins que les deux idiomes aient un génie commun et que les procédés intellectuels des deux peuples soient identiques, toute tentative de traduction sera vaine, si elle n'est pas précédée d'une assimilation complète de la notion légale à transplanter; et cela comportera nécessairement des altérations essentielles, le développement d'aperçus nouveaux, l'ordonnance de l'ensemble et des détails suivant une économie différente, en somme une conception nouvelle de la loi, avec tous les changements nécessaires pour qu'elle convienne à une autre manière de penser, de faire et de dire. Toute autre méthode d'emprunt sera féconde en conséquences déplorable.")
12. *Ibid.* (Original French: "On ne pourra jamais empêcher que la législation fédérale soit d'inspiration anglaise, soit le reflet de la culture britannique et quelle que soit la qualité du texte français, il n'en demeurera pas moins un hors-d'oeuvre, une gentillesse, une faveur qui sera vite oubliée dès que les problèmes sérieux se poseront c'est-à-dire lorsqu'on appliquera la loi. On peut peut-être en arriver à réduire enfin les lois fédérales en français mais on n'en fera jamais une loi de culture française.")

13. As will be seen in section 3.26, most federal officials who expressed a view on the subject consider simultaneous drafting utopian.
14. On April 6, 1965, the then Premier of Quebec, Jean Lesage, read to the Legislative Assembly an exchange of correspondence with Prime Minister Pearson on the subject of improving the drafting of federal statutes in the French language. On February 25, 1965, Mr. Lesage had written to suggest that considerable improvements could result from (1) simultaneous drafting in both languages as opposed to translation and (2) printing of both versions side by side in the same volume. On March 19, 1965, Prime Minister Pearson replied noncommittally (Quebec, *Débats de l'assemblée législative*, April 6, 1965, 1848-9).
15. Canada, House of Common, *Debates* (1966), II, 1681.
16. Quoted by permission.
17. Standing Order 74; see section 13.05 (a).
18. R.S.C. 1952, c.230, s.10(3). On June 27, 1967, first reading was given in the Senate of Canada to Bill S-18 entitled an Act to amend the Publication of Statutes Act the purpose of which is to authorize the Federal Cabinet to prescribe the form to be used in the printing of the annual Statutes and the manner in which they are to be bound. At the present time, the technical requirements in this regard are set out in sections 10 and 11 of the Publication of Statutes Act. According to the explanatory notes to Bill S-18 the underlying aim is to ensure uniformity of style and form between the annual Statutes and the Revised Statutes being prepared under the Act Respecting the Revised Statutes of Canada, S.C. 1964-65, c.48.
19. John D. Honsberger, "Bi-Lingualism in Canadian Statutes," 43 *Can. Bar Rev.* (1965), 319 at 335.
20. R.S.C. 1952, c.320, s.10. At the time of publication the new revised statutes have not been issued yet. See also footnote 14 in this chapter.
21. For a comprehensive discussion of common grammatical errors found in French texts, statutes, and speeches, see *inter alia* the following: E.F. Surveyer, "Le français au prétoire," 17 *R. du D.* (1938-9), 194; J.C. Bonenfant, "Une nouvelle traduction de notre constitution," 4 *R. du B.* (1944), 35; Jean Martineau, "Une grande pitié," 54 *R. du N.* (1951-2), 150; L.J. de la Durantaye, "Les éléments de la clarté législative," 12 *R. du B.* (1952), 113; O.S. Tyndale, "Comments on the Revision of the Code of Civil Procedure," 12 *R. du B.* (1952), 201; Alfred Nadeau, "Coup d'oeil sur la rédaction française de nos lois municipales," 17 *R. du B.* (1957), 137; Alfred Nadeau, "Le français dans les procédures municipales," 63 *R. du N.* (1960-1), 185.
22. Section 14 of the Interpretation Act, R.S.Q. 1964, c.I, states: "As soon as any statute is assented to, or, if it had been reserved, as soon as the assent thereto has been signified, the Clerk of the Legislature shall deliver a certified copy thereof in French and another in English to the Queen's Printer, who shall print the same." Section 33 of this Act declares: "As soon as practicable after the prorogation of every session, the Clerk of the Legislature shall procure from the Queen's Printer a sufficient number of bound copies of the statutes. He shall deliver to the Lieutenant-Governor a copy in English and French languages, for transmission to the Governor-General, as required by the British North America Act, 1867, together with certified copies, in the English and French languages, of every bill reserved for the signification of the pleasure of the Governor-General. He shall also deliver a copy of the statutes, in the English and French languages, to the Provincial Registrar." Similarly article 4 of the Civil Code reads: "An authentic copy in French and English, of the statutes assented to by the Lieutenant-Governor, or the assent to which has been published as required by article 2, if a reserved act, is furnished by the Clerk of the Legislature to the King's printer, whose duty it is to print the number of copies indicated to him by the Lieutenant-Governor in Council and distribute them to those persons designated by orders in council and to the members of the Legislative Council and Legislative Assembly according to the joint resolution of the two Houses." The 1960 Act respecting the Revised Statutes, 1959-60, 8-9 Eliz. II, c.27, s.1(d), provided that the Attorney General shall "cause such laws to be printed so that the French and the English texts shall be

- opposite one another, on the same page, the French in the left column and the English in the right column, and have the same bound through the instrumentality of the Queen's Printer."
23. See Honsberger, "Bi-Lingualism in Canadian Statutes," 321, and letter by Quebec Premier Jean Lesage to Prime Minister Pearson, cited in footnote 14.
 24. For the rules of the Quebec Legislature see section 13.20 (b).
 25. Rule 602 of the Legislative Assembly. See Louis-Philippe Geoffrion, *Private Bills in the Legislative Assembly* (Quebec, 1961), for an annotated version of rules relating to private bills.
 26. Rule 611.

Chapter III-B

27. J. A. J. Griffith and H. Street, *Principles of Administrative Law* (London, 1952), 37-8.
28. The best general description of the field is an article by Elmer A. Driedger, "Subordinate Legislation," 38 *Can. Bar Rev.* (1960), 1.
29. See section 2.01 for our view that there are no constitutional provisions requiring subordinate legislation either at the federal level or in Quebec to be bilingual, since section 133 of the B.N.A. Act is limited to traditional legislative processes.
30. See Appendix A.
31. See Appendix B.
32. 1952 R.S.C., c.235.
33. The operations of the *Canada Gazette* are discussed in section 3.28.
34. *Canada Gazette*, Part II, December 8, 1954.
35. Interview with a senior official of the department of Justice, May 26, 1965.
36. The linguistic competence of these legal officers is surveyed in section 3.23.
37. This undated mimeographed memorandum, which is at present available only in English, and a copy of which was made available to us on July 24, 1967, through the kindness of Mr. D.F. Wall, Assistant Secretary to the cabinet, supersedes an earlier similar document entitled "Memorandum to Government Departments and Agencies," dated April 21, 1964, and issued by the then Clerk of the Privy Council, Mr. R.G. Robertson. Mr. Wall assures us that it is the intention of the Privy Council to issue this and similar documents in both official languages at the time of the next revision.
38. S.O.R./54-569, P.C. 1954-1787.
39. In sections 3.28 and following.
40. Most of the information in the present section has been obtained in interviews with various other officials of the department of Justice. The rest is based on our questionnaire.
41. R.S.C. 1952, c.184.
42. R.S.C. 1952, c.234.
43. R.S.C. 1952, c.307.
44. An interesting indication that the Privy Council is not breaking with tradition in keeping original copies in the English language only was obtained from Dr. Eugene Forsey, in an interview on May 17, 1963, when he informed one of our research assistants that while he was working through all the Orders-in-Council between 1867 and 1882 he found only one, the Order-in-Council of May 19, 1881/1656, prepared by Sir Hector Langevin, in the French language. It was, however, signed in English "Approved, (Lorne)." Dr. Forsey looked at more than 16,000 orders.
45. For example, one commission specifically stated that its subordinate legislation was drafted in English because the drafting legal adviser knew only English.
46. Quoted by permission.
47. R.S.C. 1952, c.235, s.6(1).
48. See section 3.22.
49. The *Canada Gazette* is published by the Queen's Printer under authority given by the Public Printing Act, R.S.C. 1952, c.226, s.27.

50. Such publication is sometimes regulated by a statute: e.g., The Railway Act, R.S.C. 1952, c.234, s.298(4), requires all by-laws, rules, and regulations to be published in both English and French; the Penitentiary Act, R.S.C. 1952, c.206, s.70, provides that the Commissioner shall draw up a list of prison offences, to be printed and placed in each cell (the language of such list is not stipulated, however).
51. The information for the preceding paragraphs was derived mainly from an interview on June 10, 1965, with an officer of the Queen's Printer.

Chapter III-C

52. See Appendix C.
53. Unfortunately four very important and very active boards did not reply: the Liquor Board, the Rental Board, the Labour Relations Board, and the Securities Commission.
54. Cf. section 3.19.
55. Six boards had such regulations; four did not; two did not reply.
56. Interview.
57. Interview conducted on August 26, 1965 with an officer of the *Quebec Official Gazette*. The rules printed on the front page of the *Quebec Official Gazette* require that all notices be supplied in French and English. If they are in only one language, then a translation is made by the Queen's Printer at the cost of the interested party.
58. R.S.Q. 1964, c.54, ss.20ff.
59. E.g., Water Board Act, R.S.Q. 1964, c.183, s.16; Moving Pictures Act, R.S.Q. 1964, c.55, s.6; Collective Agreements and Decrees Act, R.S.Q. 1964, c.143, s.5; Colonization Land Sales Act, R.S.Q. 1964, c.102, s.4.
60. Superior Council of Education Act, R.S.Q. 1964, c.234, s.28.
61. Water Board Act; Collective Agreements and Decrees Act.
62. *Ontario*: The Official Notices Publication Act, R.S.O. 1960, c.266; The Regulations Act, R.S.O. 1960, c.349; *Prince Edward Island*: The Interpretation Act, R.S.P.E.I. 1951, c.1, s.7(3); *Saskatchewan*: The Regulations Act, S.S. 1963, c.79, s.4.
63. *New Brunswick*: Queen's Printer Act, R.S.N.B. 1952, c.189, ss.9, 11, and 13; *Newfoundland*: The Public Printing and Stationery Act, R.S.Nfld. 1952, c.27, ss.10(1) and 12(1); *Yukon*: Public Printing Ordinance, R.O.Y.T. 1958, c.93, s.2.
64. Original French: "Les textes de loi ainsi que les règlements qui doivent paraître dans la Gazette Officielle de Québec sont publiés dans les deux langues; les autres publications qui sont pour la plupart des règlements de régie interne sont rédigées en français seulement. . . les règles de régie interne qui ne sont pas publiés [sic] dans la Gazette Officielle de Québec sont rédigées en français seulement."
65. Original French: "Toutes nos ordonnances et règlements intéressant le public sont publiés dans les deux langues dans la *Gazette Officielle*. . . Les annonces, les avis et directives intéressant les employeurs et salariés sont publiés dans les journaux anglais et français, dans la langue utilisée par le journal."
66. Original French: "Les ordonnances générales de réglementation des entreprises publiques" and "Les ordonnances établissant les tarifs des entreprises publiques." "Les ordonnances de nature particulière concernant ou affectant une entreprise publique désignée sous un vocable français, une corporation municipale de la province ou tout autre institution, même bilingue, opérant dans la province."
67. Original French: "La Régie suit essentiellement une politique bilingue en ce sens que toutes les lois qu'elle a charge d'appliquer sont bilingues et que les règlements qui émanent d'elle le sont également. Dans tous ses rapports avec les personnes qui entrent en contact avec elle, la Régie utilise la langue de son interlocuteur."

Chapter III-D

68. Arthur G. Doughty and Duncan A. McArthur, *Documents Relating to the Constitutional History of Canada, 1791-1818* (Public Archives [of Canada], 4 George V, Sessional Paper No. 29c [Ottawa, 1914]), 105; italics added.
69. An Act respecting the Consolidated Statutes of Canada, 1859, 22 Vic., c.29, c.14. This is still the rule today in Quebec: "In case of discrepancy between the English and French versions of the Revised Statutes on any point, that text which is most consistent with the consolidated laws shall prevail" (Act respecting the Revised Statutes, 1964: S.Q., 1965, 13-14 Eliz. II, c.9, s.8).
70. C.S.L.C. 1861, c.1, s.14.
71. Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters, *Second Report*, edited by Geo. Desbarats (Quebec, 1865), 139.
72. The original texts of these sources are reproduced in their entirety in *Bibliothèque du Code Civil*, edited by C.C. De Lorimier (21 vols.; Montreal, 1871).
73. Thomas McCord, *The Civil Code of Lower Canada* (Montreal, 1867), viii.
74. S.C. 1865, 29 Vic., c.41.
75. "The laws in force at the time of the coming into force of this code are abrogated in all cases: In which there is a provision herein having expressly or impliedly that effect; In which such laws are contrary to or inconsistent with any provision herein contained; In which express provision is herein made upon the particular matter to which such laws relate; Except always that as regards transactions, matters and things anterior to the coming into force of this code, and to which its provisions could not apply without having a retroactive effect, the provisions of law which without this code would apply to such transactions, matters and things remain in force and apply to them, and this code applies to them only so far as it coincides with such provisions."
76. Loi relative à l'interprétation des lois de la province, S.Q. 1937, 1 Geo. VI, c.13.
77. S.Q. 1938, 2 Geo. VI, c.22, preamble.
78. An Act Respecting the Revised Statutes, 1964, S.Q. 1965, 13-14 Eliz. II, c.9, s.8, found in R.S.Q. 1964, I, vii. This provision repeats verbatim the following provisions of acts dealing with the Revised Statutes of Quebec: S.Q. 1941, 5 Geo. VI, c.15, s.7(2), and S.Q. 1959-60, 8-9 Eliz. II, c.27, s.7.
79. R.S.Q. 1964, c.249, s.2.
80. R.S.Q. 1964, c.257, s.51.
81. R.S.C. 1952, c.158.
82. *R. v. Dubois* [1935] S.C.R. 378; *Composers, Authors and Publishers Association v. Western Fair Assn.* [1952] 2 D.L.R. 229; *Food Machinery Corp. v. Registrar of Trademarks* [1946] 2 D.L.R. 258; *Champagne v. Rivard* (1955) 34 C.B.R. 173; *Stevenson v. Canadian Northern Railway Co.* [1948] 1 D.L.R. 247; *Commissioner of Patents v. Winthrop Chemical Co. Inc.* [1948] 2 D.L.R. 561; *Moore v. The Queen* [1903] S.C.R. 522, *Lafleur v. Guay*, [1965] S.C. 254 at 268.
83. [1935] S.C.R. 378.
84. R.S.C. 1927, c.34.
85. [1935] S.C.R. 404.
86. [1958] Q.B. 581.
87. R.S.Q. 1941, c.142, s.53(2); italics added.
88. Italics added.
89. [1958] Q.B. 581, at p. 583.
90. (1937) 75 S.C. 502.
91. "If in any article of this Code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing laws, that version shall prevail

which is most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention.”

92. Outside Quebec this practice is forbidden, as the intention of the legislature is to be found within the very words of a statute without reference to outside sources, and especially without reference to reports such as this one and similar material. However, in Quebec, the act which provided for codification of the civil law required the commissioners to submit a report on their work, and this report was to be, and still is, considered as an official document. It is not uncommon in Quebec cases to see the courts refer to these reports in interpreting ambiguous provisions in the Code, since they are permitted to do so by law. So ruled the Court at p. 508. A recent example is to be found in the case of *Boissinot v. Vibert et le Régistrateur de la Division d'Enregistrement de Québec* [1967] S.C. 126, where (at p. 127), Mr. Justice Cannon of the Quebec Superior Court quoted the comments of the commissioners for the Revision of the Code of Civil Procedure in order to interpret the scope of article 733 of the Code of Procedure (the language of which differs from its predecessor, article 931 in the old Code of Procedure).
93. *Montreal Tramways Co. v. Séguin* (1915-16) 52 S.C.R. 644.
94. *Ibid.*, at 656.
95. (1896-7), 27 S.C.R. 539.
96. 52 Vic., c.79, s.79.
97. [1948] 1 D.L.R. 247 (Manitoba Court of Appeal).
98. R.S.C. 1927, c.170, s.203.
99. [1948] 1 D.L.R. 247 at 255.
100. (1910) 15 C.C.C. 241.
101. S.Q. 1908, 7 Ed. VII, c.42, s.2.
102. [1953] Q.B. 307.
103. R.S.Q. 1941, c.162A.
104. R.S.Q. 1941, c.167.
105. *O'Farrell v. de Tilly* (1858) 2 L.C.J. 26, and *Bellingham v. Abbott* (1858) 2 L.C.J. 13.
106. *Goodyear Employees Union Ltd. et Barreau de Co. Province de Quebec v. Keable* [1967] Q.B. 49 at 53; *Robitaille v. Beaupré* (1937) 75 S.C. 502; *Rémillard v. Couture* [1955] S.C. 162; *Naud v. Marcotte* (1900) 19 Q.B. 431.
107. Municipal Code (1916), article 15; Act Respecting the Revision of Statutes, S.Q. 1941, 5 Geo. VI, c.15, s.7; Act Respecting the Revised Statutes, S.Q. 1965, 13-14 Eliz. II, c.9, s.8.
108. *City of Montreal v. A & P Food Stores Ltd.* (1949) 79 Q.B., 789.
109. *Exchange Bank of Canada v. The Queen* (1886) 11 A.C. 157 (Privy Council); *Fournier v. Atty-Gen.* (1910) 19 Q.B. 431, followed by Pratte, J. in *L'Imprimerie Populaire Ltée v. Leclerc* [1960] Q.B. 922; *Montreal Street Railway Co. v. Feigleman* (1912) 7 D.L.R. 6; *Trans-Island Motors Ltd. v. Benk* [1961] S.C. 138; *Roy v. Davidson* (1898) 15 S.C. 83.
110. *The King v. Charron* (1910) 15 C.C.C. 241; *Bernier v. The Quebec & Levis Ferry Co. Ltd.* (1911) 39 S.C. 193; *Roy v. Davidson* (1898) 15 S.C. 83.
111. *Corporation of Coaticook v. People's Telephone Co.* (1901) 19 S.C. 535; *Bellingham v. Abbott* (1858) 2 L.C.J. 13; *O'Farrell v. De Tilly*, loc. cit., p. 26 (the two previous cases are in a special section at rear of volume); *Blouin v. Dumoulin* [1958] Q.B. 581.
112. *Lacerte v. Verreault* (1899) 16 S.C. 230; *O'Farrell v. de Tilly*, above; *Bellingham v. Abbott*, above.
113. See G.A. McAllister, "Administrative Law," 6 *Can. Bar J.* (1963), 439, especially at 442f.
114. [1947] O.W.N. 155.
115. 1954 Q.B., 158.
116. Incorporated pursuant to the statute of S.Q. 1962, 10-11 Eliz. II, c.88.
117. Incorporated by the Architects Act, R.S.Q. 1964, c.261.
118. For a discussion of the problems of interpretation of conflicting versions of municipal by-laws, see section 8.04.

Part 4

Chapter IV

1. See section 1.12.
2. See section 1.13.
3. See section 1.15.
4. See sections 1.16 to 1.21.
5. See section 1.32.
6. *Constitutional Documents*, I, 207n; see section 1.32.
7. See sections 1.32 and 1.34.
8. See sections 1.36 and 1.37.
9. See section 1.43.
10. See section 1.46.
11. See section 1.61.
12. See section 1.68.
13. See section 1.74.
14. See section 1.78.
15. See section 1.79.
16. See section 1.83.
17. See section 1.88.
18. S.U.C. 1794, 34 Geo. III, c.2; see section 1.93.
19. See section 1.94.
20. S.P.C. 1841, 4-5 Vic., c.20; see section 1.107.
21. An Act to repeal certain Acts and Ordinances therein mentioned, and to make better provision for the Administration of Justice in Lower Canada, S.P.C. 1843, 7 Vic., c.16, s.28; see section 1.107.
22. S.P.C. 1846, 9 Vic., c.29, s.1; see section 1.107.
23. S.P.C. 1849, 12 Vic., c.37; repeated in C.S.L.C. 1861, c.77, s.28; see section 1.107.
24. See section 1.107.
25. An Act respecting the ordinary Procedure in the Superior and Circuit Courts, C.S.L.C. 1861, c.83, s.81.
26. An Act to diminish the Expense of Sale in justice and of Confirmations of Title, and to facilitate the taking of Enquêtes, the summoning of absentees, the judicial distribution of moneys, the seizure of constituted rents representing seigniorial rights, and to provide for the review of judgments in certain cases, in Lower Canada, S.P.C. 1864, 27-8 Vic., c.39, s.9.
27. An Act respecting Writs of Prohibition, *certiorari* and *scire facias*, C.S.L.C. 1861, c.89.
28. See section 1.122.
29. See section 1.134.
30. S.M. 1895, 58-9 Vic., c.6, s.491.
31. S.C. 1877, 40 Vic., c.7; see section 1.142.
32. See section 1.147.
33. Supreme Court Act, R.S.C. 1952, c.259, s.6.
34. *Ibid.*, s.30(2).
35. Albert Mayrand, "Le bilinguisme aux Rapports judiciaires du Canada," 24 *R. du B.* (1964), 234. On June 22, 1967, during the second session of the Twenty-seventh Parliament, 16 Eliz. II, first reading was given to Bill C-138 presented by Réal Caouette to amend the Supreme Court Act, R.S.C. 1952, c.259, and to provide for publication in both languages of all judgments and opinions given by the Supreme Court or Justices thereof, into the other official language. It should be noted that the bill did not aim at compelling the judges of the Supreme Court to render decisions in two languages, but was designed to ensure Court-approved translations.
36. R.S.C. 1952, c.98.

37. Mayrand, "Le bilinguisme aux Rapports judiciaires du Canada," 234.
38. R.S.C. 1952, c.1, cited as the Admiralty Act, s.3(1).
39. Canada Prize Act, R.S.C. 1952, c.28, s.3(1).
40. R.S.C. 1952, c.184.
41. As amended by S.C. 1953, c.24, s.5, and S.C. 1955, c.28, ss.11 and 12, and re-enacted by S.C. 1955, c.5, s.6, and by S.C. 1964, c.21, s.5.
42. Canada, Royal Commission on Government Organization, *Report* (Ottawa, 1962-3), I, 70-5.
43. Military Rules of Evidence, P.C. 1959-1027, *Canada Gazette*, pt.II, S.O.R. 159-310, p.769, s.79. National Defence Act, S.C. 1950, 14 Geo. VI, c.43, s.158, as amended by R.S.C. 1952, c.310, s.2(2).
44. Dissolution and Annulment of Marriages Act, S.C. 1963, 12 Eliz. II, c.10, s.3.
45. Exchequer Court Act, R.S.C. 1952, c.98, s.6A, as amended by 1964, c.14, s.3.
46. Adopted during the session of 1963 and obtainable from the Queen's Printer in Ottawa.
47. R.S.C. 1952, c.14, s.140. The Bankruptcy Rules, P.C. 1954-1976, 1955-1, *Canada Gazette*, pt. II, S.O.R., p.159, s.4, state that provincial rules of practice apply to all bankruptcy proceedings, so far as possible.
48. R.S.C. 1952, c.33, as amended by 1953, c.23; 1953-4, c.34; 1956, c.6, and 1958, c.24.
49. Section 34(2), as amended by 1956, c.6, s.7.
50. Section 30, as replaced by 1956, c.6, s.6.
51. R.S.C. 1952, c.331, as amended by S.C. 1955, c.48, s.9.
52. Section 23(1).
53. R.S.C. 1952, c.331, as amended by S.C. 1960, c.20, s.6.
54. Sections 32 *et seq.*, as amended by S.C. 1957-8, c.30, s.2.
55. S.C. 1952-3, 1-2 Eliz. II, c.53, ss.27 *et seq.*, as amended by S.C. 1960, c.24, ss.6 *et seq.*
56. Section 35 as amended.
57. Section 36 as amended.
58. Criminal Code, s.2(10)(a).
59. Criminal Code, s.2(38).
60. Set up by the Highway Victims Indemnity Act, R.S.Q. 1964, c. 232, ss.32-5.
61. Mining Act, S.Q. 1965, 13-14 Eliz. II, c.34, ss.276 and 298.
62. *See* section 7.02.
63. Highway Code, R.S.Q. 1964, c.231, s.32.
64. *Ibid.*, s.33.
65. *Mining Act*, s.278.
66. *Ibid.*, s.279.
67. *Ibid.*, s.297.
68. R.S.Q. 1964, c.35, s.2.
69. Court of Appeal (in civil and in criminal matters); Superior Court (general rules and rules for the District of Montreal in civil matters); Court of Queen's Bench, Crown Side (general rules in criminal matters adopted May 21, 1966, by judges of Superior Court in their capacity as judges of the Court of Queen's Bench); Provincial Court (general rules and rules for the District of Montreal).
70. In section 1.154.
71. R.S.N.B. 1952, c.74.
72. Bill 53, An Act to Amend The Evidence Act, introduced by the Attorney General at the 5th Session, 45th Legislative Assembly, N.B., 16 Eliz. II, 1967.
73. *Cf.* section 4.16(e). Some provinces stipulate that only English can be used in judicial proceedings: e.g., Ontario in the Judicature Act, R.S.O. 1960, c.197, s.124, and Alberta in its former Interpretation Act, R.S.A. 1955, c.16, s.40, which was abrogated by S.A. 1958, c.32. But generally, language practices in provincial courts are based on custom or usage and not on statutory authority if the replies to our queries from judges and practitioners across Canada are correct.
74. In sections 1.136 and following.

75. As we shall see in section 4.27.
76. See Canadian Press despatch published in the *Sault Ste Marie Star* and in the *Ottawa Citizen* of May 28, 1964.
77. See *Toronto Daily Star*, April 23 and 24, 1964, and *Lethbridge Herald*, May 2, 1964.
78. *Montreal Star*, July 15, 1965.
79. *Montreal Star*, July 29, 1965.
80. S.C. 1960, 8-9 Eliz. II, c.44, s.2(g).
81. *Ibid.*, s.5(3).
82. E.g., National Defence Act, R.S.C. 1952, c.184, s.158; Queen's Regulations, nos. 112-18 and 112-19, adopted pursuant to the National Defence Act; rule 79 of the Military Rules of Evidence, P.C. 1959-1027, *Canada Gazette*, pt. II, p.769, S.O.R./59-310.
83. R.S.C. 1952, c.284, s.3.
84. The text of the treaty is appended as a schedule to the statute.
85. S.C. 1960, 8-9 Eliz. II, c.39, s.45(11), and rule 41 found in Schedule A. A tariff of fees for interpreters in federal elections was established by Order-in-Council P.C. 1963-188, *Canada Gazette*, pt. II, no.165.
86. R.S.C. 1952, c.30, s.45.
87. Indian Referendum Regulations, s.25, P.C. 1958-1451, *Canada Gazette*, pt. II, p.1236, 1958 Canada, Statutory Orders and Regulations, no. 437; Military Rules of Evidence, P.C. 1959-1027, *Canada Gazette*, pt. II, p.769, S.O.R./59-310, s.79, adopted pursuant to the National Defence Act; Rules in Admiralty, P.C. 1495 of July 29, 1939, ss.96, 102.
88. *Alta.*: Election Act, S.A. 1956, 5 Eliz. II, c.15, s.85(1) and (3); *B.C.*: Provincial Elections Act, R.S.B.C. 1960, c.306, s.111; *Man.*: Manitoba Election Act, R.S.M. 1954, c.68, s.87; Municipal Act, R.S.M. 1954, c.173, s.159; *N.B.*: Elections Act, R.S.N.B. 1952, c.1, s.71(1); *N.W.T.*: Orders-in-Council P.C. 1963-189, *Canada Gazette*, pt. II, p.176, and P.C. 1961-435, *Canada Gazette*, pt. II, p.451; Municipal District Ordinances, R.O.N.W.T. 1956, c.73, s.21(2); *N.S.*: Provincial Electoral Franchise Act, R.S.N.S. 1954, c.228, s.17(1)(d); Elections Act, S.N.S. 1962, 11 Eliz. II, c.4, s.108(1) and (2); *Ont.*: Election Act, R.S.O. 1960, c.118, s.90; Voters Lists Act, R.S.O. 1960, c.420, s.86; *Que.*: Election Act, R.S.Q. 1964, c.7, ss.251, 252, and 255; Cities and Towns Act, R.S.Q. 1964, c.193, s.232; Education Act R.S.Q. 1964, c.235, s.144; *Sask.*: Saskatchewan Election Act, R.S.S. 1953, c.4, s.93; City Act, R.S.S. 1953, c.137, s.168; Town Act, R.S.S. 1953, c.138, s.155; *Yukon*: Orders-in-Council P.C. 1963-189, and P.C. 1961-435 mentioned herein above.
89. *Alta.*: Rules of the Supreme Court of Alberta, ss.330, 868, adopted by Order-in-Council of July 1, 1949, consolidated in 1962; *Man.*: Rules of Practice of the Court of King's Bench, rule 252 and form 45 (Winnipeg, 1939); *N.W.T.*: Coroners' Ordinances, R.O.N.W.T. 1956, c.18, s.22(5); Protection of Children Ordinance, R.O.N.W.T., c.80, s.44(1); *N.S.*: Court Reporters Act, R.S.N.S. 1954, c.53, s.6(1); *Ont.*: Administration of Justice Expenses Act, R.S.O. 1960, c.5, s.13; Coroners' Act, R.S.O. 1960, c.69, ss. 33, 37(7); County Judges' Act, R.S.O. 1960, c.77, s.14; Rules of Practice, no. 282 (see R. M. Willes Chitty, *Ontario Annual Practice* [1964], 271); *Que.*: Code of Civil Procedure, ss.305, 296; *Sask.*: Revised Rules of Courts of the Province of Saskatchewan, rules 293, 562 (Regina, 1961)).
90. *N.B.*: Summary Convictions Act, R.S.N.B. 1952, c.220; *N.W.T.*: Order-in-Council P.C. 2750, Canada S.O.R. (1955), III, 2479; *Que.*: Coroners' Act, R.S.Q. 1964, c.29, s.14; *Yukon*: Yukon Act, S.C. 1952-3, 1-2 Eliz. II, c.53, s.16(j); Coroners' Ordinances, R.O.Y.T., c.24, s.22(5); Order-in-Council P.C. 6423, Canada, S.O.R. (1955), III, 3009; Judicature Ordinance, R.O.Y.T. 1958, c.60, s.14.
91. *R. v. Meceklette* (1910) 15 C.C.C. 17 (Ont. C.A.) followed in *R. v. Sylvester* (1912) 1 D.L.R. 186 (N.S.S.C.); and *Donkin v. The "Chicago Maru"* (1916) 28 D.L.R. 804 (Exch. Ct.).
92. *R. v. Meceklette*.
93. *Donkin v. The "Chicago Maru"*; *Ponomoroff v. Ponomoroff* [1925] 3 W.W.R. 673; *R. v. Wong On* (No. 2) (1904) 8 C.C.C. 343.

94. *Sadowski v. La Reine* [1963] Q.B. 677, commented on by Claude-Armand Sheppard in "Droit à l'Interprète," 24 *R. du B.* (1964), 148.
95. We shall see in section 4.28 that this is a widespread practice in Canada. *See also* section 4.29.
96. (1914-15) 11 C.A.R. 293 [1916] 1 K.B. 337.
97. *R. v. Lee Kun*, 301.
98. *R. v. Sylvester et al* (1912) 1 D.L.R. 186; italics added.
99. *Ibid.*, 198.
100. [1946] 1 D.L.R. 659, also reported at [1945] 3 W.W.R. 720, 62 B.C.R. 99, and 85 C.C.C. 97.
101. (1902) 11 Q.B. 328.
102. *R. v. Sylvester*, 331.
103. *R. v. Randall* (1963) 38 D.L.R. (2d) 624 (N.B.C.A.).
104. *R. v. Mlaker* (1923) 40 C.C.C. 287.
105. *Ibid.*, 297.
106. *Eltore v. R.* [1965] Q.B. 432.
107. *R. v. Walker* (1911) C.C.C. 77, and particularly at 105; and *R. v. Meceklette*.
108. *R. v. Sylvester*, and *R. v. Bogh Singh* (1913) 12 D.L.R. 626 (B.C.C.A.).
109. *R. v. Louie* (1903) 7 C.C.C. 347 at 354.
110. (1963) 31 Tax A.B.C./220.
111. *Nishi v. M.N.R.*, 222.
112. *See* section 4.23 and also section 4.27.
113. According to the 1961 census the highest proportions of persons stating that French was their mother tongue were found in census divisions of Edmonton (15,243 or 3.7 per cent), St. Paul Bonnyville (8,564 or 18.1 per cent), Athabaska (1,720 or 3.8 per cent), Edson (735 or 3.8 per cent), and Grande Prairie-Peace River (7,535 or 9.8 per cent).
114. Original French: "Nous avons, au palais de justice, un huissier qui fait aussi de la traduction français à anglais, et un autre qui en fait de 4 à 5 langues européennes, sauf le français. C'est surtout dans la cour de magistrat que leurs services sont requis. L'huissier, traducteur français-anglais, n'est pas compétent et les avocats franco-Manitobains lorsqu'ils ont besoin d'interprète, font presque toujours assermenter un de leurs étudiants en droit ou un ami compétent. Réellement il n'y a pas de problèmes."
115. A practice which may find a legal foundation if Bill 53, amending the New Brunswick Evidence Act, R.S.N.B. 1952, c.74, is adopted. It would permit the use of languages other than English in all judicial proceedings if all parties and their counsel understand the language. While this provision could apply in theory to any language, it is clearly aimed at legalizing the described informal use of French in New Brunswick courts.
116. For evidence that many Ontario counties have a French population varying from 22.9 per cent to 82.6 per cent, *see* section 4.38(e).
117. We have not been able to find this old tariff, but Order-in-Council no. 3261 of 1937, *Quebec Official Gazette*, LXIX (1937), 4793 (Tarif des Greffiers de la Paix et du Greffier des Juges de Paix) provides (in s.27) that interpreters be paid \$1.50 "par séance" (per sitting).
118. *See* sections 5.03, 5.08, and 5.10.
119. (1919) 58 S.C.R. 414, affirming (1919) 28 B.R. 36.
120. (1919) 58 S.C.R. 414 at 416-18.
121. *Ibid.*, 419.
122. *Ibid.*, 420.
123. *Ibid.*, 424-7. (Original French: "Maintenant, quelle est l'étendue du droit qui était conféré aux prévenus?

"On a prétendu que ce droit ne consistait que dans le choix des jurés et ne comportait pas l'obligation pour la cour de voir à ce que toutes les procédures soient conduites dans les deux langues afin d'être bien comprises par tous les membres du jury.

"Ce serait, suivant moi, un droit bien illusoire si, malgré le droit qu'aurait un anglais, par exemple, de choisir un jury mixte, il était permis à la couronne de faire entendre les témoins en langue française et de ne pas traduire leurs témoignages en anglais de manière à ce que la

teneur de ces témoignages fût comprise par les jures de langue anglaise. Cela constituerait un grave déni de justice.

“Il en serait de même pour le résumé (charge) de juge. Ce dernier devrait voir à ce que son allocution soit comprise de tout le jury.

“Il est vrai que la loi est silencieuse sur la manière dont une cause devra être conduite devant un jury mixte. Mais je ne veux pas de meilleure interprétation de la loi que cette pratique, constamment suivie depuis plus de cent cinquante ans, que dans le cas de jury mixte les dépositions des témoins sont traduites dans les deux langues et le résumé du juge est également fait ou traduit en anglais et en français. . . .

“Mais on dit: Il n’y a pas eu de protestation dans la cause actuelle quand le juge a omis de parler en français, le prisonnier a donné son témoignage en anglais, son avocat n’a parlé qu’en anglais quand il a fait son allocution aux jurés, et, de plus, on a demandé aux jurés français s’ils connaissaient l’anglais et ils ont répondu que oui.

“Toutes ces circonstances ne sauraient prouver qu’il y a eu acquiescement formel à cette illégalité. Je me demande même si dans un procès pour meurtre un acquiescement formel serait suffisant. La loi criminelle exige que dans les procès qui peuvent entraîner la peine capitale toutes les précautions doivent être prises pour que toutes les règles de la procédure soient suivies avec la plus grande rigueur. (Russell on Crimes, vol. 3, p. 2156.)

“Nous avons au dossier une preuve enonçant que certain jure n’avait pas une connaissance suffisante de l’anglais pour comprendre tout ce qui a été dit par le juge et les témoins.

“Nous avons également au dossier un fait qui ne porte pas, il est vrai, sur la question que je suis à examiner, mais qui démontre bien l’importance d’avoir tous les témoignages bien traduits. L’un des témoins donne son témoignage en anglais et rapporte une conversation de l’accusé qui était cependant tenue en français. On lui demande de répéter en français le texte de cette conversation. Il y a une variante importante. On la signale au témoin et il est obligé de dire: ‘The way they rattle me up is in French and English. I have a little of both and all the words are mixed up.’

“Ce témoignage est des plus importants dans la cause. Nous voyons que la version anglaise donnée par le témoin de cette conversation incrimine bien plus l’accusé que les mots dont ce dernier se serait servi d’après ce même témoin quand il rapporte le texte français. Ce texte français ne paraît pas avoir été traduit en anglais aux jurés et nous trouvons dans le dossier le fait que certains jurés ne comprenaient pas du tout le français.

“Tout cela démontre l’importance qu’il y a de conduire la cause dans les deux langues et le danger qu’il y a de ne pas le faire.

“Pour maintenir le verdict, l’intimé se base aussi sur le fait que l’avocat de la défense n’a pas parlé aux jurés en français.

“L’accusé était évidemment un adolescent bien pauvre, sans famille et sans protection. Il a trouvé dans son jeune défenseur un homme bien dévoué qui a évidemment entrepris cette cause sans l’espoir de toucher un sou d’honoraire. Mais, comme cet avocat le dit lui-même dans son factum, ‘he was a very young member of the bar, and had not then the advantage of the experience which he has since acquired, was led into the error of following the action of Crown counsel and of the presiding judge.’ ”

124. *Ibid.*, 430-2. (Original French: “Revenant maintenant à la disposition de la loi 27-28 Vict. ch. 41, il est clair que cette disposition serait illusoire si, dans un procès instruit devant un jury mixte, les témoignages n’étaient pas traduits du français en anglais, et réciproquement, et si l’adresse du juge présidant le procès n’était pas faite, du moins quant à ses parties essentielles, dans ces deux langues. Telle a toujours été la pratique en la province de Québec, et le savant conseil de l’intimé devant nous, Mtre. Gaboury, en réponse à une question que je lui ai posée, a admis que cette pratique était aussi suivie dans le district de Pontiac. Je suis donc d’opinion que le prisonnier qui demande un jury mixte a le droit d’avoir un procès instruit dans les deux langues, française et anglaise, ce qui comprend bien l’adresse du juge au jury.

“On invoque le fait que dans cette cause les jures de langue française ont déclaré lors de leur assermentation qu’ils comprenaient l’anglais, que lorsque le premier témoin a témoigné en

anglais, les jurés de langue française, interrogés par le juge, ont répondu qu'ils avaient compris son témoignage, que le défenseur du prisonnier avait parlé l'anglais dans son plaidoyer au jury, et que le prisonnier lui-même avait rendu son témoignage en anglais. De là on conclut qu'il y a eu acquiescement du prisonnier à l'instruction du procès dans la langue anglaise.

"J'hésiterais beaucoup à conclure du silence du prisonnier, ou même du fait qu'il a donné son témoignage en anglais, qu'il a renoncé à un droit indubitable qui découle de son choix d'un jury mixte, celui de faire instruire son procès dans les deux langues. Mais puis-je dire qu'il y a dans cette cause ce que la question soumise appelle 'substantial wrong or miscarriage,' sans quoi, aux termes de l'article 1019 du Code Criminel, un nouveau procès ne peut être ordonné? . . .

"Je suis bien d'avis qu'il a été fait quelque chose de non conforme à la loi pendant le procès, c'est-à-dire que l'accusé avait droit à ce que le procès fût instruit dans les deux langues, et à ce que l'adresse du juge au jury fût faite ou traduite, au moins dans ses parties essentielles, dans les deux langues, mais puisque le Code Criminel exige en outre que je sois d'opinion qu'il en est résulté un tort réel ou un déni de justice, je ne puis, dans toutes les circonstances de cette cause, aller jusque là.

"Je dois donc, et non sans regret, concourir dans la décision de la cour d'appel sur cette première question.")

125. [1956] S.C.R. 191.
126. *Reference re Regina v. Coffin* [1956] S.C.R. 191, at p. 214-15.
127. *R. v. Ciarlo* (1897) 6 K.B., 144.
128. (1913) 10 D.L.R. 522 at 523.
129. [1965] 3 C.C.C. 216.
130. [1932] 1 W.W.R. 545.
131. *R. v. Defilippi*, 547.
132. (1915) 24 C.C.C. 51.
133. Section 583A of the Criminal Code.
134. See "Court Reporters Resent Machines," *Montreal Star*, Dec. 15, 1965, 3. For evidence of the merits of a mechanical system of recording evidence, see Lawrence E. Davies, "Alaska's Courts Tape Their Trials: Time and Cost of an Appeal Is Now Least in Nation," *New York Times*, Nov. 10, 1963, 69.
135. Particularly in section 4.24.
136. Interviews.
137. "Court Steno Shortage Irks Judge," *Montreal Star*, Sept. 7, 1965.
138. R.S.Q. 1964, c.30, ss.2 and 3.
139. S.Q. 1965, 13-14 Eliz. II, c.34, s.292 states: "The Mining Judge may order the evidence to be taken down in shorthand or by means of a recording machine. . . ."
140. Art. 324 of the new Code of Procedure.
141. Reciprocal Enforcement of Judgments Act, S.A. 1958, 7 Eliz. II, c.33, s.5; Reciprocal Enforcement of Maintenance Orders Act, S.A. 1959, 7 Eliz. II, c.42, s.12.
142. Reciprocal Enforcement of Judgments Act, R.S.B.C. 1960, c.331, s.6; Reciprocal Enforcement of Maintenance Orders Act, R.S.B.C. 1960, c.332, s.13.
143. Reciprocal Enforcement of Judgments Act, S.N. 1960, 9 Eliz. II, c.12, s.6; Maintenance Orders Enforcement Amendment Act, S.N. 1961, 10 Eliz. II, c.34, s.5.
144. Reciprocal Enforcement of Judgments Act, S.M. 1961, 10 Eliz. II, c.30, s.6.
145. Reciprocal Enforcement of Judgments Ordinance, R.O.Y.T. 1958, c.95, s.4; Reciprocal Enforcement of Maintenance Orders Ordinance, R.O.Y.T. 1958, c.96, s.12.
146. R.O.N.W.T. 1963, second session, c.17, s.3.
147. R.O.N.W.T. 1956, c.82, s.4.
148. See sections 4.16(f) and (g).
149. R.S.O. 1960, c.36, s.11.
150. R.S.O. 1960, c.345.
151. R.S.Q. 1964, c.23, s.10.

152. *Ibid.* This law requires that the Act apply only to provinces, designated by the provincial cabinet, whose laws permit the execution in their respective territories of similar Quebec judgements. Order-in-Council 276, *Quebec Official Gazette*, XCVI (1964), 6169, declares the statute to apply to Ontario, New Brunswick, Nova Scotia, and Prince Edward Island; Order-in-Council 304, *ibid.*, 6170, extends it to Newfoundland, and Order-in-Council 1623, *ibid.*, renders the statute applicable to British Columbia judgements.
153. In section 6.08.
154. See sections 1.147 and 1.149 for our conclusion that both these Territories are still officially bilingual.
155. In section 4.17.
156. All the figures in this section are based on Canada, Dominion Bureau of Statistics, *Census of Canada, 1961* (Ottawa 1962-7), I, pt. 2, Bell. 1.2-9.

Chapter V

1. *Canadian Constitutional Law* (3rd ed., Toronto, 1966), 838-9.
2. R.O.N.T. 1956, c.55, s.5(i).
3. See sections 1.149, 1.150 and 4.16(g).
4. *R. v. Vonhoff* (1867) 10 L.C.J. 292.
5. *R. v. Vonhoff*, 292-3.
6. *Ibid.*
7. James Kennedy, *A Treatise on the Law and Practice of Juries* (London, 1826), 87-8; William Forsyth, *History of Trial by Jury* (London, 1852), 230.
8. 33 Vic., c.14, s.5: "From and after the passing of this Act, an alien shall not be entitled to be tried by a jury de medietate linguae, triable in the same manner as if he were a natural-born subject."
9. See section 1.37.
10. See section 1.43.
11. G. Doutre and E. Lareau, *Histoire générale du droit canadien* (Montreal, 1892), I, 609. See also section 1.145.
12. William Brown and Thomas Gilmore, *Ordinances of the Governor and Council of the Province of Quebec, 1764-67* (Quebec, 1767), 72-3. See also section 1.46.
13. See section 1.60.
14. See section 1.68.
15. See section 1.78.
16. An Act to establish trials by jury, S.U.C. 1792, 32 Geo. III, c.2. See also section 1.93.
17. S.P.C. 1847, 10-11 Vic., c.13, s.23.
18. S.P.C. 1851, 14-15 Vic., c.89.
19. C.S.L.C. 1861, c.84.
20. As was held in *Duval v. R.* (1938) 64 K.B. 270 at 284; *R. v. Sheehan* (1897) 6 K.B. 139 at 140; *R. v. Yancey* (1899) 8 K.B. 252 at 253; *Alexander v. R.* (1930) 49 K.B. 215 at 216.
21. (1864) 8 L.C.J. 280.
22. S.C. 1869, 32-3 Vic., c.29, s.39.
23. R.S.C. 1886, c.174, s.161.
24. Manitoba Act, S.C. 1870, 33 Vic., c.3.
25. S.M. 1870, 34 Vic., c.14. See also section 1.134.
26. E.g., Supreme Court Act, S.M. 1871, 34 Vic., c.2, s.19, amended by S.M. 1872, 35 Vic., c.35.
27. S.M. 1876, 39 Vic., c.3, s.36, amended by S.M. 1877, 40 Vic., c.19.
28. S.M. 1881, 44 Vic., c.28.
29. S.M. 1883, 46-7 Vic., c.1, s.7.
30. E.g., by S.M. 1884, 47 Vic., c.4, amending S.M. 1883, 46-7 Vic., c.1, and by S.M. 1885, 48 Vic., c.17, consolidating previous statutes providing for mixed juries in both civil and criminal cases.

31. An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, S.M. 1890, 53 Vic., c.14, s.1.
32. *Nfld. Reports* (1874-84), 121.
33. A statute of the Criminal Law, Consolidated Statutes of Newfoundland 1872, c.39, s.1: "In all cases not provided for by local enactment the Law of England as to crimes and offences, shall be the law of this Island and its dependency . . ."
34. C.19 of the 1872 Consolidated Statutes of Newfoundland.
35. C.56, s.4.
36. Judicature Act, R.S. Nfld. 1952, c.114, s.93.
37. R.S.Q. 1964, c.26.
38. *Piperno v. R.* [1953] 2 S.C.R. 292 at 295, affirming [1953] Q.B. 80; *Reference re R. v. Coffin* [1956] S.C.R. 191 at 207.
39. *R. v. Twyndham and McGurk* (1943) 79 C.C.C. 395.
40. *Reference re R. v. Coffin*.
41. *Piperno v. R.*
42. *Reference re R. v. Coffin*, 207, 215; *Alexander v. R.* (1930) 49 K.B. 215; *Piperno v. R.*, 295; *Sheehan v. R.* (1897) 6 K.B. 139.
43. *R. v. Yancey*, 252.
44. *Piperno v. R.*; see also *Duval et al v. R.* (1938) 64 K.B. 271; *Veullette v. R.* (1919) 58 S.C.R. 414, affirming (1919) 28 K.B. 364; *Mount v. R.* (1931) 51 K.B. 482; *Bureau v. R.* (1932) 52 K.B. 15 at 18; *Gouin v. R.* (1937) 43 R.L.N.S. 149; *Lacasse v. R.* (1939) 66 K.B. 74, affirming (1938) 76 S.C. 45.
45. *Lacasse v. R.*; *Mount v. R.*; *Duval v. R.*
46. *Montreal Gazette*, Feb. 19, 1965, 17.
47. *R. v. Yancey*; *Alexander v. R.*, 217; *Bureau v. R.*; *Lacasse v. R.*
48. Lagarde, *Droit pénal canadien* (Montreal, 1962), 829.
49. *Piperno v. R.*
50. *R. v. Dougall* (1874) 18 L.C.J. 85.
51. *R. v. Sheehan*, 141.
52. *Veullette v. R.*
53. *R. v. Chamillard* (1874) 18 L.C.J. 149. This decision should be contrasted with the case of *R. v. Earl*, 10 *Man. R.* (1894), 303, also reported in 31 *Can. Law J.* (1895), 37, discussed hereafter (in section 5.13), which held that the fact that one juror did not understand English was not a sufficient cause for a mistrial in Manitoba.
54. R.S.M. 1954, c.130.
55. 10 *Man. R.* (1894), 303, also reported in 31 *Can. Law J.* (1895), 37.
56. The problems arising from the use of interpreters in trials by mixed jury have been reviewed in section 4.27.
57. Québec, Commission d'Enquête Brossard sur l'Affaire Coffin, *Rapport* (1964), II, 671-2.
58. S.Q. 1965, 13-14 Eliz. II, c.80.
59. Article 334.
60. Article 340. Article 336 further provides that although the trial is normally held at the place where the action is pending, "if the interests of justice so require" it may be held at any other place where the court sits. Conceivably such change of venue could result from the inability to find a linguistically competent panel in the district where the action is pending. The trial, and choice of panel, would be moved to an area where sufficient jurors of the selected language could be found.
61. Printed on p.67a of the first reading of the draft bill of the new Code of Procedure: Quebec, Bill 20, 13 Eliz. II, 1964, 3rd session, 27th legislature.
62. R.S.Q. 1964, c.26.
63. *Banque Canadienne Nationale v. Ouellet* (1933) 55 K.B. 114 at 115; *Bégin v. Maurice Pollack Realty Co. et al* [1963] R.P. 385 at 388 (S.C.); *Beaulieu v. Montreal Street Railway Co.* (1911) 12 R.P. 263 (S.C.).

64. *Cie des Tramways de Montréal v. Crowe* (1915) 24 K.B. 122 at 125, 126; *Canadian Rubber Co. v. Karavokiris* (1911) 12 R.P. 122 (K.B.); *Les frères de la Charité v. Martin* (1909) 18 K.B. 268.
65. *Cassidy v. City of Montreal* (1898) 1 R.P. 535 (S.C.); *Evans v. City of Montreal* (1898) 1 R.P. 262 (S.C.).
66. *McDonald v. Grand Trunk Railway Co. of Canada, and City of Montreal* (1917) 18 R.P. 411 (S.C.).
67. *Smith v. Mount Royal Hotel Co. Ltd.* (1929) 32 R.P. 149 (S.C.); *Les Frères de la Charité v. Martin*.
68. *Smith v. Mount Royal Hotel Co. Ltd.*
69. *Les Frères de la Charité v. Martin*.
70. *Nihon v. Consolidated Theatres Ltd.* (1939) 43 R.P. 102 at 106 (S.C.).
71. *Rodrigue v. Boulais* (1933-34) 36 R.P. 430 (S.C.); *Les Frères de la Charité v. Martin*.
72. Art. 436, C.P. *Gibeault v. Weiser* (1931-32) 34 R.P. 422 (S.C.).
73. (1917) 18 R.P. 288.
74. [1953] K.B. 462, at 470. (Original French: "Interpréter autrement l'art. 436 serait porter une atteinte sérieuse aux droits que l'on a garantis aux néo-Canadiens, lors de leur entrée au pays. Parmi ces droits, ils ont certes acquis celui de se faire entendre devant les tribunaux dans leur langue d'adoption, soit le français soit l'anglais, à leur choix. Refuser l'exercice de ce droit et forcer, sous prétexte que sa langue maternelle ou d'origine n'est ni le français ni l'anglais, le néo-Canadien de procéder dans une langue autre que celle qu'il a apprise—français ou anglais—constitueraient, à mon sens, une négation de droit que la Législature n'a pas su sanctionner.")
75. *Schneiderman and Lavigne v. Warhaft* [1949] R.P. 35 K.B.
76. *Bernier v. Montreal Light, Heat and Power Co.* (1911-12) 13 R.P. 116.
77. *Montreal Street Railway v. Girard* (1911) 21 K.B. 121.
78. "Amendments to Procedure regulating Trial by Jury in Civil Matters," 12 *R. du B.* (1952), 267-8.

Chapter VI

1. R.S.C. 1952, c.259, and amendments.
2. R.S.C. 1952, c.98, and amendments.
3. Bora Laskin, *Canadian Constitutional Law* (3rd ed.; Toronto, 1966), 817.
4. "96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."
5. "No constitutional question arises in respect of the power of the Dominion to control and dictate the procedure in federal courts; and where a provincial court is seized of a 'federal' cause of action the Dominion may, if it chooses, prescribe the procedure through which it is to be enforced therein." Laskin, *Canadian Constitutional Law*, 835.
6. I.e., the jurisdiction "to make laws for the Peace, Order and good Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."
7. See Appendix D.
8. See Appendix E.
9. See Appendix F for the practices of the Appeal Boards of the Civil Service Commission.
10. One board stated, "This question cannot be answered in the form asked. Written replies or submissions are dealt with in writing in the language used in filing them. Oral proceedings are conducted in English or French, with translators."
11. Immigration Regulations, P.C. 1962-3, *Canada Statutory Orders and Regulations* (1962), p. 141, s.5, provide that whenever an inquiry is held by a Special Inquiry Officer under the

Immigration Act, and the person being examined “does not understand or speak the language in which the proceedings are being held” the presiding officer shall immediately obtain to assist such person “without charge” an interpreter “who is conversant in a language understood by the person being examined.”

12. (1963) 31 Tax A.B.C./220; *see also* section 4.25.

Chapter VII

1. *See* Appendix G.
2. Bora Laskin, *Canadian Constitutional Law* (3rd ed.; Toronto, 1966), 791-815.
3. [1949] A.C. 134, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055, the decision of the Saskatchewan Court of Appeal being reported at [1948] 1 D.L.R. 652 and [1948] 1 W.W.R. 81.
4. [1958] S.C.R. 535, 14 D.L.R. (2d) 417, an appeal from Ontario Court of Appeal [1957] O.R. 377, 8 D.L.R. (2d) 193, reversing a judgement of Ferguson, J. [1957] O.R. 193, 8 D.L.R. (2d) 26.
5. Quoted in Laskin, *Canadian Constitutional Law*, 805.
6. Laskin, *Canadian Constitutional Law*, 799-801. This jurisprudence was followed recently by the Quebec Court of Appeal to uphold the constitutionality of the Labour Relations Board: *Tremblay and La Fédération Canadienne des Associations Indépendantes and others v. Commission de Relations Ouvrières de Québec and Fédération des Travailleurs du Québec and others* [1966] Q.B. 44.
7. *See* section 6.07.
8. *See* section 6.08.
9. Original French: “Au sein de l’administration, tout se fait en français.” “Toute décision est rendue en français et sera traduite, si celui à qui elle est adressée est de langue anglaise.”
10. Original French: “La version française est bien accueillie même des procureurs qui sont de langue anglaise.” “Beaucoup de procédures sont entamées devant la Régie dans les deux versions simultanées française et anglaise. Ce qui donne entière liberté à la Régie de tout traiter exclusivement en français, si tel est son désir.” “Dans la pluralité des cas, les auditions se font en français, puisque la plupart des personnages entendus sont de langue française. Si la décision concerne un groupe à prédominance anglaise, la décision sera rendue dans cette langue.” “Simple politesse – Reconnaît statut des deux langues officielles – Notre organisme se donne beaucoup de travail à cette fin.” “Certains régisseurs prétendent qu’il est plus facile pour eux de rendre une décision dans leur langue maternelle. Certains régisseurs prétendent qu’il est plus normal de rendre la décision dans la langue de celui à qui elle s’adresse.”
11. Original French: “Bien que le français y soit prédominant, la langue parlée ne semble provoquer aucune récrimination. L’interlocuteur de langue anglaise se sent à l’aise d’utiliser sa langue ou plaider en anglais s’il a l’impression d’être mieux compris, et il use librement de son droit. Le français n’est pas imposé.” “Toujours bien accueillie. Rares sont les cas où il faut y recourir exclusivement. Mais les exigences sont respectées.”
12. Original French: “Le français étant plus précis il est parfois difficile de trouver une traduction exacte.” “Pose quelques problèmes de traduction lorsque notre organisme rend une sentence arbitrale. Ce n’est pas un problème insurmontable.”

Part 5

Chapter VIII

1. *See* Appendix H.
2. Charter of the city of Montreal, 1960, S.Q. 1959-60, 8-9 Eliz. II, c.102, as amended.
3. According to the 1961 census 21.91 per cent of the population of the Montreal metropolitan zone spoke only English, 39.17 per cent spoke only French, 36.81 per cent spoke both

- languages, and 2.1 per cent spoke neither language. In Montreal proper, out of a total of 1,191,062 citizens, 212,461 spoke only English, 479,411 spoke only French, and 462,804 claimed to be bilingual. If mother tongue is taken as a criterion, English was the mother tongue of only 203,562 Montrealers.
4. An Act more effectually to provide for the regulation of the Police in the Cities of Quebec and Montreal, and the Town of Three-Rivers, and for other purposes therein mentioned, R.A.O.L.C. 1845, Class D, c.21.
 5. C.S.L.C. 1861, c.24, and 24 Vic., c.61.
 6. R.S.Q. 1964, c.193.
 7. An Act respecting Municipalities and Roads in Lower Canada, C.S.L.C. 1861, c.24, ss.10, 11.
 8. An Act to incorporate the Town of Joliette, S.P.C. 1863, 27 Vic., c.23, s.43.
 9. An Act to incorporate the Village of Beauharnois as a Town, S.P.C. 1863, 27 Vic., c.24, s.7.
 10. An Act to amend the Acts relating to the Corporation of the City of Montreal, and for other purposes, S.P.C. 1864, 27-28 Vic., c.60, s.13(11) (notices of expropriation), s.39 (notices of tax assessments), and s.45 (notices of water rates).
 11. An Act to amend and consolidate the provisions contained in the Acts and Ordinances relating to the incorporation of and the supply of water to the City of Quebec, S.P.C. 1865, 29 Vic., c.57, s.11 (notice of list of electors), s.11(17) (notice at meetings of Board of Revisors), s.12(3) (notice of nominations of candidates to municipal offices), s.17(8) (publication of abstracts of accounts of city treasurer), s.55 (notice of found animals), s.34 (notice of deposit of general plan of the city), s.35(4) (notices of assessments), s.34(14) (notices of decision of expropriation commissioners), s.34(19) (publication of resolution that city ready to furnish water).
 12. S.P.C. 1865, 29 Vic., c.61, s.36(4).
 13. S.P.C. 1866, 29-30 Vic., c.63, s.5.
 14. An Act to amend the provisions of several Acts relating to the City of Montreal, and for other purposes, S.P.C. 1866, 29-30 Vic., c.56, s.11.
 15. R.S.Q. 1964, c.193, s.362.
 16. Art. 129.
 17. Arts. 130, 131, and 131a.
 18. *Tremblay v. The Corporation of the South Part of the Township of Onslow* [1933] 39 R. de J. 193 (Magistrate's Court, now Provincial Court).
 19. R.S.Q. 1941, c.229.
 20. One city stated, "Certains règlements d'application courante tel que les règlements de zonage, construction, taxes d'affaires, des chiens, ont été traduits en Anglais sur demande." (Translation: Certain regulations of general application such as those concerning zoning, construction, business taxes, and dogs have been translated into English on request.)
 21. S.Q. 1959-60, 8-9 Eliz. II, c.102, s.17.
 22. See sections 3.40-3.46.
 23. See section 3.35.
 24. By-law 1319, art.16(b).
 25. By-law 1319, art.107.
 26. By-law 2223.
 27. By-law 2305, art.2.
 28. *Ibid.*
 29. By-law 2572, art.1(1).
 30. *Ibid.*
 31. By-laws 891, art.164; 1089, art.29; 1305, art.17; 1319, art.156; 1447, art.12; 1448, art.20; 2572, art.6-2; 2812, art.14; 2395, art.0-6; 2751, art.33. By-law 1447, art.12, states: "In case any clause of the English version of this by-law should not agree with the corresponding clause of the French version, the French text in which said by-law has been prepared, shall prevail" (italics added).
 32. By-law 2369, art.3.

33. In art. 10a.
34. See sections 78-110 of the charter.
35. It should be noted that s.1169 refers only to the language of the newspaper and not to that of the notice. Technically the notice could be published in the same language in both newspapers.
36. By-law 340, s.10, dealing with explosives and combustible material, requiring bilingual notice by the City Clerk of a request for permission to erect or use a building; by-law 407, s.2, providing for public notice in both languages of the appointment of the Electric Service Commission of the City of Montreal; by-law 581, s.3, concerning the wiring of buildings to connect with the municipal underground system, stating that a bilingual public notice shall be given of the completion of underground conduits; by-law 612, s.1, concerning the erection of ice houses, requiring bilingual notice thereof; by-law 962, art.3, concerning the erection or establishment of night refuges, requiring public notice in two languages of an application to erect a night refuge; by-law 1009, art.3, concerning laundries, also requiring public notice in both languages. All the foregoing by-laws required a notice to be published by advertisement in English and French newspapers rather than stating specifically that the notice must be in both languages. Technically, if it could do so under the general law, the city could publish such notices in one language in French and English newspapers and comply with its by-laws.
37. The discrepancy in numbers, producing a total of 17 answers for 16 municipalities is due to the fact that one city replied both that its signs were bilingual and that they were in French only.
38. Arts. 5-7 and 8-3.
39. Art.10-10.
40. Arts. 24a and 82a added by by-law 2595.
41. Art.10 ("matériel usagé"/"second-hand material"), art.11 ("matériel neuf"/"new material"), and art.14.
42. Art.14 (official stamp bearing "approuvé approved") and art.15 ("approuvé approved" and "inspecté inspected").
43. One city stated: "... les procédures devant la Cour municipale de la Cité sont en Français sauf que si l'accusé est de langue Anglaise; L'acte d'accusation, le plaidoyer et autres procédures inhérentes sont faites en Anglais." (Translation: ... the procedures before the municipal Court of the City are in French unless the accused is English-speaking; the charge, the speech for the defence, and other inherent procedures are made in English.)
44. See section 8.03.
45. Art.3 as modified by by-law 3025.
46. Art.3 as modified by by-law 2628.
47. E.g., by-laws 1960, 2014, 2025, 2056, 2057, 2058, 2071, 2073, 2074, 2078, 2091, 2108, 2127, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2155, 2156, 2157, 2161, 2191, 2201, 2214, 2233, 2253, 2284, 2315, 2323, 2324, 2326, 2357, 2370, 2375, 2384, 2391, 2392, 2406, 2408, 2411, 2421.
48. See competition 64-171 dated October 8, 1964, issued by the Personnel Department of the city of Montreal. An examination of sample employment notices from the city of Montreal shows that the language qualifications required vary from "une connaissance raisonnable de l'anglais" for policemen, to an ability to speak and write English and French "correctly" (competition 65-36, 85-81). Generally the requirement is simply to speak and write both languages (64-73, 65-85).
49. By-law 2519, art.4(c).
50. By-law 2745, art.18.
51. By-law 1981, art.15.
52. By-law 2909 modifying art.15 of by-law 1981.
53. By-law 1981, art.14.
54. In section 8.03.
55. R.S.A. 1955, c.215, s.85.
56. R.S.A. 1955, c.42, s.96(1).

57. S.M. 1955, 3-4 Eliz. II, c.86, s.7(1).
58. S.M. 1957, 5-6 Eliz. II, c.80, s.11(1)(b).
59. S.M. 1960, 8-9 Eliz. II, c.40, s.20(1)(c).
60. See Chapter XIII.
61. See section 4.38.
62. The census figures are not helpful since they provide linguistic breakdowns only for municipalities exceeding 10,000 inhabitants.
63. See section 4.17.
64. See section 4.38.

Chapter IX

1. See section 2.01.
2. See section 1.70.
3. An Act to repeal certain Acts therein mentioned, and to consolidate the laws relating to the election of Members to serve in the Assembly of this Province, and to the duty of Returning Officers, and for other purposes, R.A.O.L.C. 1845 (Class A), c.4, s.9.
4. An Ordinance to authorize certain further improvements in the Harbour of Montreal, to establish new rates of Wharfage therein, to authorize the Commissioners for the improvement of the same to borrow a further sum of money, and for other purposes relative to the said Harbour, R.A.O.L.C., 1845 (Class G), c.14, s.14 (advertisement of intended repayment of monies borrowed); An Ordinance to suspend in part certain Acts therein mentioned, and to establish and incorporate a Trinity House in the City of Montreal, R.A.O.L.C. 1845 (Class F), c.6, s.4 (notice of meetings of wardens); An Ordinance to declare and regulate the tolls to be taken on the Bridge over Cap Rouge River, and for other purposes relative to the said bridge, R.A.O.L.C. 1845 (Class G), c.8, s.8 (posting of ordinance and table of tolls in both languages); An Act to authorize the Commissioners appointed under a certain Act passed in the eleventh year of the reign of His late Majesty, intituled, An Act to provide for the improvement and enlargement of the Harbour of Montreal, to borrow an additional sum of money, and for other purposes therein mentioned, R.A.O.L.C. 1845 (Class G), c.14, s.5 (notice of repayment of sums borrowed); An Act to amend An Act passed in the forty-fifth year of His Majesty's Reign intituled, An Act for the better regulation of Pilots and Shipping in the Port of Quebec and in the Harbour of Quebec and Montreal, and for improving the navigation of the River St. Lawrence, and for establishing a fund for decayed Pilots, their Widows and Children, R.A.O.L.C. 1845, c.12, s.11 (bilingual notice of by-laws, rules and regulations dealing with *culs-de-sac* in the lower town of Quebec); An Act respecting the General Abolition of Feudal Rights and Duties, C.S.L.C. 1861, c.41, s.12 (bilingual posting and publication of notice of schedule of commutation price of feudal rights).
5. An Act to repeal certain Acts therein mentioned, and to amend, consolidate, and reduce into one Act, the several Statutory provisions now in force for the regulation of Elections of Members to represent the People of this Province in the Legislative Assembly thereof, S.P.C. 1849, 12 Vic., c.27, respectively ss.9 and 11.
6. An Act respecting Unclaimed Goods in the hands of Wharfingers and others, C.S.L.C. 1861, c.66, s.1.
7. An Act respecting forced Licitations, C.S.L.C. 1861, c.48, s.3.
8. An Act respecting goods unclaimed in the possession of the Clerks of the Peace, C.S.L.C. 1861, c.104, s.2.
9. An Act concerning the protection and enforcement of Corporate Rights, C.S.L.C. 1861, c.88, ss.10(4) and 14(3) respectively.
10. An Act respecting the Sale under Execution of hypothecated Immoveables of unknown or uncertain Owners, C.S.L.C. 1861, c.49, ss.3 and 4.
11. An Act respecting Insolvency, S.P.C. 1864, 27-8 Vic., c.17, s.11.

12. An Act to amend Chapter Sixty-eighth of the Consolidated Statutes for Lower Canada, respecting Mutual Insurance Companies, S.P.C. 1865, 28 Vic., c.13, s.2.
13. S.P.C. 1865, 29 Vic., c.82, s.10.
14. S.C. 1953-4, c.48, ss.82(3)(d), 89(4)(a)(ii), 89(4)(b)(i) and (ii).
15. S.C. 1960, c.39, s.25(2).
16. *Ibid.*, s.25(2).
17. S.C. 1960-61, 9-10 Eliz. II, c.57, s.36.
18. S.C. 1967, 14-15 Eliz. II, 1st Session, 27th Parliament, Bill C-181, s.14.
19. S.O.R./67-129, *Canada Gazette*, pt.II, CI (1967), 4.
20. R.S.C. 1952, c.232, s.5(1).
21. *Ibid.*, s.17.
22. *Ibid.*, s.39.
23. R.S.C. 1952, c.234, s.298(4).
24. *Ibid.*, s.305(2).
25. *Ibid.*, s.306(3).
26. *Ibid.*, s.411, as amended by S.C. 1958, c.40.
27. R.S.C. 1952, c.296, s.159(2).
28. E.g., Animal Contagious Diseases Act, R.S.C. 1952, c.9, ss.3 and 9; Bank Act, ss.3(1) and (3), 16(4), 21(31), 30(2), 33(21), 36, 37, 40, 55, 57, 65, 76, 80, 88(4), 112, 113(2), 116, 117, 128, and 132(2); Bridges Act, R.S.C. 1952, c.20, s.4; Canada Lands Surveys Act, R.S.C. 1952, c.26, s.10; Canada Shipping Act, R.S.C. 1952, c.29, s.49; Canada Elections Act, S.C. 1960, c.39, s.56(5).
29. S.5(1).
30. P.C. 1962-302, s.1.25.
31. R.S.Q. 1964, c.54.
32. See section 3.38.
33. E.G., arts. 716 and 673, of the Code of Civil Procedure; Cities and Towns Act, R.S.Q. 1964, c.193, s.551; Religious Congregations Lands Act, R.S.Q. 1964, c.306, s.13.
34. E.g., arts. 1896 and 1048 of the Code of Civil Procedure; Cities and Towns Act, s.2(2); Courts of Justice Act, R.S.Q. 1964, c.20, s.328(e); Superior Council of Education Act, R.S.Q. 1964, c.234, s.28; Water Board Act, R.S.Q. 1964, c.183, s.16; Moving Pictures Act, R.S.Q. 1964, c.55, s.6; Collective Agreement Decrees Act, R.S.Q. 1964, c.143, s.5; Colonisation Land Sales Act, R.S.Q. 1964, c.102, s.4; Church Incorporation Act, R.S.Q. 1964, c.305, s.4; Amusement Clubs Act, R.S.Q. 1964, c.298, s.4; Executive Power Act, R.S.Q. 1964, c.9, s.7; Companies Act, R.S.Q. 1964, c.271, s.127(1)(d), 127(2); Municipal Commission Act, R.S.Q. 1964, c.170, s.39, 52, and 57.
35. See section 3.38.
36. Art. 1896 of the Civil Code; arts. 716, 673, and 1092 of the Code of Civil Procedure; Cities and Towns Act, s.2(2) and 551; Water Board Act, s.13; Collective Agreement Decrees Act, s.5; Church Incorporation Act, s.4 (here the language of newspaper publication is not specified); Religious Congregations Lands Act, s.13 (bilingual notices are required, but not necessarily in newspapers of different languages); Amusement Clubs Act, s.4; Companies Act, s.127(1)(d); Municipal Commission Act, ss.39 and 52; Insurance Act, R.S.Q. 1964, c.295, ss.11 and 27; Railway Act R.S.Q. 1964, c.290, s.199; Change of Name Act, S.Q. 1965, 13-14 Eliz. II, c.77, s.5.
37. Civil Code, arts. 1571a (notice of sale of a debt of an absent debtor), 1571d (notice of registration of sale of a class of debts), 1671a (notice of sale of objects left with jeweller for more than 3 years); new Code of Civil Procedure, arts. 116 (synopsis of order permitting summoning of heirs by newspaper), 139 (synopsis of order permitting summoning of absent defendant by newspaper), 594 (notice of sale of seized movable property), 671 (notice of sale of seized immovable), 800 (notice of hypothecary actions against unknown proprietors), 891 (notice of sale of immovable belonging to minor), 1414 and 938 (notice of intended application for letters of verification in *ab intestate* succession); Gas, Water and Electricity Companies

- Act, R.S.Q. 1964, c.285, s.4; Unclaimed Goods Sales Act, R.S.Q. 1964, c.316, ss.7 and 9 (notice of sale of unclaimed goods by launderers or dyers and fur merchants); Bills of Lading Act, R.S.Q. 1964, c.318, s.8 (notice of sale by auction of certain lumber products); Constitut or Tenure System Act, R.S.Q. 1964, c.322, s.6 (notice of offer to absent proprietor); Montreal Catholic School Commission Act, S.Q. 1957-8, 6-7 Eliz. II, c.53, s.10 as amended by S.Q. 1962, 10-11 Eliz. II, c.17 (notice of appeal against assessment); Provincial Controverted Elections Act, R.S.Q. 1964, c.8, s.65 (notice of intention to discontinue petition); Public Health Act, R.S.Q. 1964, c.161, s.82 (notice of taking of immovable belonging to absent owner); Liquor Board Act, R.S.Q. 1964, c.44, s.46 (notice of application of permit); Public Inquiry Commission Act, R.S.Q. 1964, c.11, s.5 (notice of time and place of first meeting); Companies Act, s.94 (notice of shareholders' meetings in the absence of express provisions in letters patent or by-laws of the company); Insurance Act, R.S.Q. 1964, c.295, ss.11 and 181 (notice of general meetings).
38. Arts. 1571a, 1571d, and 1671a of the Civil Code; Arts. 670 and 671 of the new Code of Procedure; Education Act, R.S.Q. 1964, c.235, s.300; Unclaimed Goods Sales Act, ss.7 and 9; Bills of Lading Act, s.8; Provincial Controverted Elections Act, s.65; Liquor Board Act, s.47; Companies Act, ss.94 and 186.
 39. E.G. arts. 935 and 139 of the new Code of Procedure.
 40. Arts. 639, 717, 1069, and 1352 of the Code of Procedure; Education Act, s.301; Unclaimed Goods Sales Act, s.9; Insurance Act, s.27(2).
 41. Order-in-Council 459, s.15, *Quebec Official Gazette*, XCVI (1964), 1889; Order-in-Council 2380, s.5., *Quebec Official Gazette*, XCIII (1961), 5283; Order-in-Council 2372, annex B, art. 4, *Quebec Official Gazette*, XCIII (1961), 138.
 42. E.g., Cities and Towns Act, s.373; Constitut or Tenure System Act, s.6; Montreal Catholic School Commission Act, s.10.
 43. One notable exception is Order-in-Council 980, *Quebec Official Gazette*, XCVII (1965), 2981, enacting regulations under the Change of Name Act, S.Q. 1965, 13-14 Eliz. II, c.77.
 44. Arts. 594 and 671 of the Code of Civil Procedure (notice of sale of movables and immovables to be posted in sheriff's office), 800 (posting of notice of hypothecary actions against unknown proprietor at door of parish church where immovable is situated); Gas, Water and Electricity Companies Act, s.4 (posting of notices at church doors); Public Building Safety Act, R.S.Q. 1964, c.149, s.31 (notice of exits in certain buildings).
 45. Cities and Towns Act, s.373 (newspaper notices in lieu of posting up).
 46. For a discussion of the history of this article, see section 9.11.
 47. R.S.Q. 1964, c.66, s.20.
 48. Cities Act, R.S.S. 1953, c.137, s.13.
 49. R.S.S. 1953, c.4, s.39(1).
 50. E.g., Oleomargarine Act, R.S.N.B. 1952, c.164, s.2(b).
 51. S.M. 1962, 11 Eliz. II, c.126, s.10(2).
 52. S.N.B. 1958, c.106, s.104(1).
 53. In section 8.10.
 54. R.S.C. 1952, c.60, s.15.
 55. R.S.C. 1952, c.201, s.8(1)(b).
 56. R.S.C. 1952, c.209, s.9(1).
 57. R.S.C. 1952, c.215.
 58. R.S.C. 1952, c.220, s.5.
 59. Canada, *Statutory Orders and Regulations* (1955) II, 1442, s.7(2) and (3).
 60. P.C., 1954-1915, Canada, *Statutory Orders and Regulations* (1955) II, 1830, regulations C.O.001(b) and (k) and D.01.001(a) and (h).
 61. R.S.Q. 1964, c.231, s.44(2)(2)(d).
 62. R.S.Q. 1964, c.7, s.54(2).
 63. R.S.Q. 1964, c.149, s.30.

64. R.S.Q. 1964, c.290, s.135(1). It should be noted that the English version of this section refers only to the words "railway crossing" and the French version only to "traverse de chemin de fer." There is no requirement that signs be in both languages.
65. See section 9.05, and more fully discussed in section 9.11.
66. Order-in-Council 683, published in the *Quebec Official Gazette*, XCIX (April 15, 1967), 2507.
67. R.S.Q. 1964, c.119.
68. *Manitoba*: The Game and Fisheries Act, R.S.M. 1954, c.94, s.96(2), provides for notices on which are written "Hunting or Shooting is forbidden"; the Highway Traffic Act, R.S.M. 1954, c.112, s.64(7) provides for signs marked "School Van."
New Brunswick: The Pawnbrokers Act, R.S.N.B. 1952, c.169, s.9(2) provides for a sign saying "Pawnbrokers."
Ontario: The Highway Traffic Act, R.S.O. 1960, c.172, s.93(3) requires a sign on public vehicles saying, "This vehicle stops at all railway crossings"; the Hotel Fire Safety Act, R.S.O. 1960, c.179, provides in s.11 for exit signs and at s.13 provides that "a hotel shall display in each bedroom a floor plan showing the location of the exits and indicating the directions of travel to reach them and also a notice giving the fire safety rules of the hotel"; the Hotel Registration of Guests Act, R.S.O. 1960, c.180, s.5(1) provides that a notice of rates should be posted. The Mining Act, R.S.O. 1960, c.241, s.241(2) provides for signs in English on public roads during blasting operations.
69. S.S. 1954, 3 Eliz. II, c.74, s.45(3).
70. R.S.C. 1952, c.12, s.53.
71. R.S.C. 1952, c.100, s.55(1).
72. R.S.C. 1952, c.33.
73. P.C. 1954-692.
74. R.S.A. 1955, c.53, s.130(3).
75. R.S.M. 1955, c.297, s.12.
76. S.M. 1957, 5-6 Eliz. II, c.20, s.5(1).
77. Intoxicating Liquor Act, R.S.N.B. 1952, c.116, s.51(1).
78. By S.N.B. 1961-2, c.3.
79. S.N.B. 1954, 3 Eliz. II, c.62.
80. S.N.B. 1958, c.106.
81. R.S. Nfld. 1952, c.168, s.260(6).
82. R.S.Q. 1964, c.159, ss.20 and 21.
83. R.S.Q. 1964, c.235, forms 25 and 27.
84. R.S.Q. 1964, c.193, form 19.
85. R.S.Q. 1964, c.45, s.9.
86. Adopted pursuant to the Dental Act, R.S.Q. 1964, c.253.
87. R.S.C. 1952, c.27, s.16(2).
88. Canadian Citizenship Act, R.S.C. 1952, c.33, ss.10(1)(3) and (5)(b).
89. S.C. 1960-61, c.57, s.47.
90. P.C. 1954-2055, 1955-1, ss.19 and 32A, Canada, *Statutory Orders and Regulations*, no. 617.
91. P.C. 1961-1475, s.26(3)(b), *Canada Gazette* (1961), 1597, or Canada, *Statutory Orders and Regulations* (1961), no. 458.
92. P.C. 1957-191, s.27(3)(b), *Canada Gazette* (1957), pt.II, 182, Canada, *Statutory Orders and Regulations* (1957), no. 51, as amended by P.C. 1961-425, *Canada Gazette*, (1961), pt.II, 427, Canada, *Statutory Orders and Regulations* (1961), no. 114.
93. P.C. 1962-302, s.1.31(2), *Canada Gazette* (1962), pt.II, 295, Canada, *Statutory Orders and Regulations* (1962), no. 90.
94. R.S.A. 1955, c.215, s.85.
95. R.S.A. 1955, c.42, s.96(1).
96. R.S.A. 1955, c.47, ss.72(c) and 73(b) respectively.
97. R.S.B.C. 1960, c.242, ss.15(5) and 20(3)(a) respectively.
98. R.S.M. 1954, c.215, ss.88, 111, and 447(4) respectively.

99. S.M. 1955, 3-4 Eliz. II, c.86, s.7(1).
100. S.M. 1957, 5-6 Eliz. II, c.80, s.11(1)(b).
101. S.M. 1960, 8-9 Eliz. II, c.40, s.20(1)(c).
102. S.M. 1962, 11 Eliz. II, c.126, s.2.
103. S.N.B. 1958, c.70.
104. R.O.N.T. 1956, c.55, s.5(i).
105. No.9 of 1898, s.38(34).
106. R.O.N.T. 1956, c.86, s.97(2).
107. R.S.O. 1960, c.393, s.5.
108. R.S.O. 1960, c.278, s.3.
109. O.S. 1961-2, c.81, s.173.
110. R.S.Q. 1964, c.26, s.3(e).
111. *Ibid.*, s.38, and art. 338 of the Code of Civil Procedure.
112. R.S.Q. 1964, c.28, s.1.
113. R.S.Q. 1941, c.47, s.15.
114. R.S.Q. 1964, c.40, s.15.
115. R.S.Q. 1964, c.188, s.15.
116. R.S.Q., c.249, ss.38 and 40.
117. R.S.Q. 1964, c.253, s.9.
118. R.S.Q. 1964, c.262, s.13.
119. R.S.Q. 1964, c.247, s.76(1).
120. R.S.Q. 1964, c.303, ss.31, 33, 34.
121. S.Q. 1947, 11 Geo. VI, c.79, c.1.
122. S.Q. 1947, 11 Geo. VI, c.80, s.1.
123. R.S.Q. 1964, c.157, ss.20 and 44.
124. R.S.Q. 1964, c.150.
125. Order-in-Council no. 545 of February 22, 1935, s.22.
126. R.S.S. 1953, c.169, ss.30(2) and (4), 74, and 75(2).
127. R.S.S. 1953, c.170, s.16.
128. R.O.Y.T. 1962, c.7, ss.7 and 27(b).
129. R.S.C. 1952, c.27, s.16(1).
130. S.C. 1960-61, c.57, s.38(2).
131. S.O.R./54-723, P.C. 1954-2055, s.19 appears in the *Canada Gazette* LXXXIX (1955), pt.II, 643.
132. S.O.R./58-457, P.C. 1958-1508, s.16, *Canada Gazette* XCII (1958), pt.II, 1271.
133. S.O.R./57-457, P.C. 1957-1498, Canada, S.O.R., 1957, vol. 91, 1214, as amended by S.O.R./63-20, P.C. 1963-50, vol. 97, 42.
134. S.O.R./62-90, P.C. 1962-302, Canada, *Statutory Orders and Regulations* (1962), p. 300-1, s.1.27(2).
135. R.S.M. 1954, c.276, s.64.
136. R.S.M. 1954, c.135, s.20(1), as amended by S.M. 1963, 12 Eliz. II, c.43.
137. R.S.Q. 1964, c.249, s.38.
138. R.S.Q. 1964, c.259, s.36.
139. R.S.Q. 1964, c.263, s.31.
140. R.S.Q. 1964, c.248, s.36.
141. R.S.Q. 1964, c.157.
142. Order-in-Council no.2745, s.19, *Quebec Official Gazette*, LXXIV (1942), 2901.
143. S.C. 1952-3, 1-2 Eliz. II, c.49, s.12.
144. *Ibid.*, s.30(1).
145. R.S.C. 1952, c.146, s.3.
146. In section 9.05.
147. S.Q. 1910, 1 Geo. V, c.40.
148. (1911) 47 *Canada L.J.*, 52.
149. *Lyburn v. Mayland* [1932] A.C. 318.

150. R.S.Q. 1964, c.141.
151. Made pursuant to the Minimum Wage Act, R.S.Q. 1941, c.164.

Chapter X

1. See section 8.12.
2. Except so far as we have studied the linguistic requirements for certification in certain positions: see sections 9.09 and 9.10.
3. R.S.C. 1952, c.53, s.22(2) and (3)(b), as amended by S.C. 1964-5, c.52 in force July 1, 1965. It should be noted that under schedule A of the Bank Act, S.C. 1953-4, c.48, chartered banks are authorized to carry on business under their French names as well as under their English names.
4. Recent random examples of statutes passed by Parliament for the sole purpose of adding a French version of an English corporate name are: S.C. 1964-5, 13-14 Eliz. II, c.56 (Allstate Insurance Company of Canada), c.57 (The Casualty Company of Canada), c.58 (The Dominion Life Assurance Company), c.59 (The Dominion of Canada General Insurance Company), c.60 (The Economical Mutual Insurance Company), c.61 (The General Accident Assurance Company of Canada), c.62 (Scottish-Canadian Assurance Corporation), c.71 (The Guarantee Company of North America), c.79 (The Quebec Board of Trade).
5. E.g., An Act respecting Canadian General Insurance Company, S.C. 1960-61, c.67; An Act to incorporate the Equitable General Insurance Company, S.C. 1960-61, c.70; An Act respecting The Canada Permanent Trust Company, S.C. 1960-61, c.77; An Act to incorporate Canadian Federation of Music Teachers' Associations, S.C. 1960-61, c.81; An Act respecting The Canadian Council of The Girl Guides Association, S.C. 1960-61, c.80; An Act re The Canadian General Council of the Boy Scouts Association, S.C. 1960-61, c.82; An Act to incorporate International Brain Research Organization, S.C. 1960-61, c.84; The Canadian Indemnity Co. & Canadian Fire Insee. Co., S.C. 1962, 10-11 Eliz. II, c.31; Mutual Life Insee. Co. of Canada, S.C. 1962, 10-11 Eliz. II, c.32; Reliance Insee. Co. of Canada, S.C. 1962, 10-11 Eliz. II, c.33; Sun Life Assurance Co. of Canada, S.C. 1962, 10-11 Eliz. II, c.34; Westmount Life Insurance Company, S.C. 1962, 10-11 Eliz. II, c.35; Imperial Life Assurance Company, S.C. 1962, 11 Eliz. II, c.18; Merit Insee. Co., S.C. 1962, 11 Eliz. II, c.19; North American General Insee. Co., S.C. 1962, 11 Eliz. II, c.20; Eastern Trust Company, S.C. 1962, 11 Eliz. II, c.24.
6. S.C. 1964-5, c.52, s.50. A full discussion of the legal problems involved in the use of corporate names under federal law, including the question of bilingual names, is to be found in the recent essay by Louis Lesage, "Le nom corporatif," *R. du B.* [1967], 390.
7. R.S.C. 1952, c.31, as amended.
8. R.S.C. 1952, c.272, as amended.
9. R.S.C. 1952, c.170, as amended.
10. E.g., Canadian National Railways Act, S.C. 1955, c.29, as amended; Canadian Overseas Telecommunication Corporation Act, R.S.C. 1952, c.42, as amended; Trans-Canada Airlines Act, R.S.C. 1952, c.268, as amended; Bell Telephone Company of Canada Act, S.C. 1880, c.67, as amended.
11. S.C. 1964-5, c.40, ss.4, 27, and 35.
12. Cf. section 13.11(e).
13. Incorporated by S.A. 1964, 13 Eliz. II, c.107.
14. Incorporated by S.A. 1957, 6 Eliz. II, c.108.
15. S.A. 1964, 13 Eliz. II, c.130.
16. E.g., An Act to provide for the exemption of certain Lands from Taxation, 14 Eliz. II, S.A. 1965, c.125, s.2 of which refers to the Corporation des Soeurs de la Sainte Croix et des Sept Douleurs.
17. L'Association d'Éducation des Canadiens-Français du Manitoba, incorporated by S.M. 1964, 13 Eliz. II, c.78; the St. Boniface College Scholarship Fund also incorporated under the name L'Oeuvre des Bourses du Collège de St-Boniface.

18. S.M. 1964, 13 Eliz. II (2nd session), c.3.
19. S.N.B. 1963, c.2, s.10(1).
20. R.S.N.B. 1952, c.40, s.11.
21. See Appendix I.
22. R.S.Nfld. 1952, c.168, s.260(6).
23. N.W.T. Ordinances of 1902, c.13.
24. R.S.N.S. 1954, c.53, as amended by S.N.S. 1962, c.24, s.6(a).
25. S.N.S. 1961, c.108.
26. S.N.S. 1961, c.122.
27. L'Association Canadienne-Française d'Éducation d'Ontario, O.S. 1960, c.150; Le Centre des Jeunes de Sudbury (Sudbury Youth Centre), O.S. 1962-3, c.188; Université St-Paul (St. Paul University) and Université d'Ottawa, 1965, O.S. c.139.
28. R.S.Q. 1964, c.271.
29. S.Q. 1959-60, 8-9 Eliz. II, c.85.
30. *Quebec Corporation Manual*, edited by Louis de B. Gravel and James A. Grant (Toronto), 1503 (loose-leaf service kept up to date currently).
31. E.g., the Corporation du Pont de Trois-Rivières, constituted by Order-in-Council 850, *Quebec Official Gazette*, XCV (1963), 2715, pursuant to S.Q. 1955-6, 4-5 Eliz. II, c.161, and 1962, 10-11 Eliz. II, c.36.
32. E.g., An act to provide for Exemption from Taxation of certain Property of Les Filles de la Providence, S.S. 1963, 12 Eliz. II, c.84; Les Soeurs de Notre-Dame-de-la-Croix, S.S. 1962, 11 Eliz. II, c.73; Le Collège Catholique Romain de Prince Albert, S.S. 1955, c.78, and S.S. 1961, c.89; An Act to change the name of Le Collège Catholique de Gravelbourg, to Collège Mattieu, Gravelbourg, S.S. 1961, 10 Eliz. II, c.91.
33. See section 1.150.
34. R.O.Y.T. 1958, c.19, s.152(a).

Part 6

Chapter XI

1. Interview with a member of the Federal-Provincial Relations division of the department of Finance, June 14, 1965.
2. The most distinguished student of the field being D.V. Smiley; see D.V. Smiley, *Conditional Grants and Canadian Federalism* ("Canadian Tax Papers," no.32 [Toronto, 1963]).
3. See Appendix J.
4. See Appendix K.
5. According to a senior official of the department of Justice, 12 of the 60 officers in the department are from Quebec, but these are mainly engaged in problems of the Civil Law division and not in those divisions which do drafting work; according to a calculation made in section 3.23, 25 per cent of the legal officers in the various departments of the federal government are to be considered bilingual, although not all of these officers would be competent to draft a legal document in French.
6. See Appendix L.

Chapter XII

1. In *The Law of Treaties* (Oxford, 1961), 4.
2. See *Law Practices Concerning the Conclusion of Treaties* (United Nations Legislative Series, ST/LEG/SER.B/3 (New York, 1953)), 24-5. See also Jean-Yves Grenon, "De la conclusion des traités et de leur mise en oeuvre au Canada," 40 *Can. Bar R.* (1962), 151. At the time Mr. Grenon was head of the Treaty division of the department of External Affairs.

3. Parliamentary ratification is not a condition *sine qua non* of the validity of treaties, but only a prerequisite for judicial enforcement in most cases. The Executive should not be entitled to legislate by the subterfuge of its treaty-making power (see Grenon, "De la conclusion des traités," 159f.).
4. Grenon, "De la conclusion des traités," 162-3.
5. This memorandum, issued on November 15, 1961, is headed "Restricted" and therefore could not be quoted at greater length. However, much of the information in the present sections is drawn from it. See also Grenon, "De la conclusion des traités," 155.
6. For agreements prior to that date, see Grenon, "De la conclusion des traités," 159, and especially n.31.
7. R.S.C. 1952, c.307, s.20.
8. Most of the research was done in the library of the Legal division of the department of External Affairs. Officers of the department were most helpful in answering questions and in supplementing information not available in the "Canada Treaty Series." We wish to express our gratitude to them.
9. Grenon, "De la conclusion des traités," 158-9, lists the principal sources of pre-1928 agreements and of unpublished agreements.
10. "Canada Treaty Series," 1965, no.2.
11. Ratified by Order-in-Council 852, April 7, 1932.
12. Ratified by Order-in-Council 853, April 7, 1932.
13. Ratified by Order-in-Council 862, April 24, 1934.
14. Ratified by Order-in-Council 181, January 18, 1945.
15. Ratified by Order-in-Council 846, May 22, 1963.
16. In an interview with one of our representatives at Quebec City on August 26, 1965.
17. For rules of interpretation of statutes, see sections 3.40 to 3.46.
18. H.W. Briggs, *The Law of Nations*, 2d. ed. (New York, 1952), 897-8.
19. A. Alvarez, *Le droit international nouveau* (Paris, 1959), 498-9. (Original French: "1° La matière est dominée par un principe essentiel . . . , savoir qu'une institution internationale, et de même certains traités, une fois créés, acquièrent une vie propre et se développent conformément non pas à la volonté de leurs auteurs mais aux conditions changeantes de la vie sociale et internationale. . . . C'est en regardant en avant et non pas en arrière qu'il faut procéder à l'interprétation des institutions et traités;
 "2° On ne doit recourir à l'examen des travaux préparatoires que quand il s'agit de rechercher la volonté des parties dans les matières qui affectent spécialement leurs intérêts;
 "3° Dans l'interprétation des traités, on ne doit donc pas s'en tenir strictement à la *lettre* des textes, si clairs soient-ils, mais tenir compte spécialement de leur *esprit*, du but poursuivi. Il faut s'inspirer de l'axiome célèbre: 'La lettre tue, l'esprit vivifie';
 "4° Il y a lieu d'établir en conséquence que les dispositions, mêmes claires, d'un traité doivent rester sans effets ou recevoir une interprétation appropriée quand, en raison des modifications survenues dans la vie internationale, leur application conduirait à des injustices manifestes ou à des résultats contraires aux fins de l'institution dont il s'agit. C'est, en somme, l'application de la clause *rebus sic stantibus*.
 "Il faut donc choisir entre suivre à la lettre les dispositions des textes, même s'ils conduisent à des résultats déraisonnables, ou modifier ces textes lorsque cela apparaît nécessaire. Le choix n'est pas douteux;
 "5° Quand dans une convention on trouve des dispositions qui ne sont pas conformes aux principes du droit international en vigueur mais qui ne se proposaient pas de les modifier et étaient seulement le résultat d'un examen incomplet du sujet, la dite convention doit être interprétée on plutôt établie conformément à l'esprit général de la législation internationale en vigueur ou modifiée. . . .
 "6° Des considérations précédentes il résulte qu'on peut, pas l'interprétation, reconnaître à une institution des droits qu'elle n'a pas d'après les textes qui l'ont créée, si ces droits sont en concordance avec la nature et les buts de l'institution. . . .

"7° . . . de ce qui précède, il résulte aussi qu'on peut, par l'interprétation, modifier de façon plus ou moins importante les traités . . . et cela afin d'harmoniser les textes avec les réalités de la vie internationale.")

20. McNair, *The Law of Treaties*, 432.
21. *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* [1954] 2 Q.B.D., 403 (England, Queen's Bench Division).
22. *Re Italian Special Capital Levy Duties*, 18 *Int. L.R.* (1951), 406, no.128 (Franco-Italian Conciliation Commission, Aug.29, 1949); *The Kronprins Gustaf Adolf v. The Pacific*, 6 Annual Digest, 372, no.205 (Arbitration) July 18, 1932; *Poznanski v. German State*, 5 Annual Digest, 506, no.298 (Germano-Polish Mixed Arbitral Tribunal, Aug. 1, 1929); *National Bank of Egypt v. German Government and Bank für Handel und Industrie*, 2 Annual Digest, 21, no.9 (Anglo-German Mixed Arbitral Tribunal, May 31, 1924).
23. *Binon v. German State and Silesian Fire Insurance Co.*, Annual Digest of Public International Law Cases, I, 290, no.274 (Germano-Belgian Mixed Arbitral Tribunal, June 1, 1922); *Société Anonyme du Charbonnage Frédéric Henri v. Germany*, *ibid.*, 227, no.158 (Franco-German Mixed Arbitral Tribunal, Sept. 30, 1921).
24. *Exchange of Greek and Turkish Populations*, 3 Annual Digest, 368, no.280 (P.C.I.J., Feb. 21, 1925); *Société Audiffren-Singrun v. Liquidation Morlang, Binger, et Société Atlas*, 4 Annual Digest, 428, no.294 (Civil Tribunal of Strasbourg, First Chamber, July 21, 1927).
25. *The Mavrommatis Palestine Concessions*, 2 Annual Digest, 331, no.193, (P.C.I.J. Aug. 30, 1924).
26. *Reparation Commission v. German Government*, 2 Annual Digest, 334, no.194 (Special Arbitral Tribunal, Sept. 3, 1942); *Weitzenhoffer v. Germany* 3 Annual Digest, 370, no.282 (Roumano-German Mixed Arbitral Tribunal, Jan. 18, 1926).
27. *Standard Oil Company Tankers Case*, 3 Annual Digest, 369, no.281 (Arbitration between U.S. and Reparation Commission, Aug. 5, 1926).
28. *Archdukes of the Hapsburg-Lorraine House v. Polish State Treasury*, 5 Annual Digest, 365, no.235 (Poland, Supreme Court, Third Division, June 16, 1930).
29. *Dürrenberg v. Polish State Treasury*, 1 Annual Digest 339, no.246 (Polish Supreme Court, Fifth Division, Sept. 29, 1922); *Flegenheimer Claim*, 25 *Int. L.R.* (1958), 91 (Italian-Conciliation Commission, Sept. 29, 1958).
30. Lassa Francis Laurence Oppenheim, *International Law*, 7th ed., by Hersch Lauterpacht (London, 1948), I, 867.
31. E.g., North Atlantic Treaty, art. 14; European Economic Community Treaty, art. 248; European Economic Energy Community Treaty, art. 225; Statute of the Council of Europe, art. 42; United Nations Charter, art. 111; peace treaties at conclusions of World War I. See also the agreement on the privileges and immunities of North Atlantic Forces, art. 27 of which states that both the French and English versions of the agreement are equally authoritative (ratified by the Privileges and Immunities (North Atlantic Treaty Organization) Act, R.S.C. 1952, c.218); the N.A.T.O. Status of Forces Agreement, art. XX of which contains an identical provision (ratified by the Visiting Forces (North Atlantic Treaty Organization) Act, R.S.C. 1952, c.284); the North Pacific Fisheries Convention, art. 11 of which declares the English and Japanese versions to be of equal authority (ratified by the North Pacific Fisheries Convention Act, S.C. 1952-3, c.44); the Agreement on Third Party Damage by Foreign Aircraft, art. 39 of which makes the English, French, and Spanish texts of equal authority (ratified by the Foreign Aircraft Third Party Damage Act, S.C. 1955, c.15). Similar provisions are also found in a multitude of bilateral tax agreements ratified by statutes: e.g. Canada-Netherlands Income Tax Agreement Act, 1957, S.C. 1957, 5-6 Eliz. II, c.16, s.27 (English and Dutch texts equally authoritative); Canada-South Africa Death Duties Agreement Act, 1957, S.C. 1957, 5-6 Eliz. II, c.17, s.8 (English and Afrikaans texts of equal authority); Canada-South Africa Income Tax Agreement Act, 1957, S.C. 1957, 5-6 Eliz. II, c.18, s.13 (English and Afrikaans of equal authority); Canada-Belgian Congo Income Tax Convention Act, 1958, S.C. 1958, 7 Eliz. II, c.12, s.20 (English and French texts equal); Canada-Belgium Income Tax Convention Act,

- 1958, S.C. 1958, 7 Eliz. II, c.13, s.20 (English and French of equal authority); Canada-Finland Income Tax Convention Act, 1959, S.C. 1959, 7-8 Eliz. II, c.20, s.20 (English and Finnish texts equally authoritative); Canada-Germany Income Tax Agreement Act, 1956, S.C. 1956, 4-5 Eliz. II, c.33, Schedule-Convention (English and German texts equally authoritative).
32. *Treaties and Agreements Affecting Canada in Force between His Majesty and the United States of America, 1814-1925* (Ottawa, 1927).
 33. Section 62 of the 6th Geneva Convention (1942), "Canada Treaty Series," 1942, no.6, provided: "The prisoner of War shall have the right to be assisted by a qualified advocate of his own choice, and, if necessary, to have recourse to the offices of a competent interpreter." Section 20 of the same Convention provided that the authorities of prisoner-of-war camps must communicate with the prisoners in the language understood by the latter.
 34. S.C. 1964-5, 13-14 Eliz. II, c.44. The Convention is annexed to the statute as schedule IV.
 35. "Canada Treaty Series," 1957, no.26.
 36. "Canada Treaty Series," 1928, no.15.
 37. "Canada Treaty Series," 1935, no.11.
 38. Exchange of notes with Spain, no.12 in 1935; with Sweden, no.13 in 1935; with Italy, no.14 in 1935; with Norway, no.15 in 1935; with Austria, no.16 in 1935; with Portugal, no.17 in 1935; with Poland, no.18 in 1935; with Turkey, no.19 in 1935; with the Netherlands, no.2 in 1936; with Estonia, no.3 in 1936; with Denmark and Iceland, no.4 in 1936; with Finland, no.5 in 1936; with Lithuania, no.13 in 1936; with Belgium, no.4 in 1937; with Czechoslovakia, no.5 in 1937; with Greece, no.1 in 1938; with Iraq, no.12 in 1938; with Yugoslavia, no.4 in 1939; with Hungary, no.6 in 1939; with Austria, no.3 in 1952.

Chapter XIII

1. See section 2.02.
2. See sections 2.03 to 2.05.
3. See sections 2.04 and 2.06.
4. In section 2.01.
5. *Ibid.*
6. In sections 3.04 to 3.12.
7. Canada, House of Commons, *Rules and Forms of the House of Commons of Canada* (4th ed., compiled by Arthur Beauchesne; Ottawa 1958), 76.
8. *Ibid.*, 161.
9. *Ibid.*, 187.
10. *Ibid.*, 263.
11. See sections 3.16 to 3.30.
12. See section 3.24.
13. In section 2.01.
14. More particularly in section 4.16.
15. See section 2.01.
16. See section 4.22.
17. See sections 5.11 and 5.13.
18. See section 6.02.
19. S.C. 1966-7, 14-15-16 Eliz. II, c.71.
20. S.O.R./67-129, *Canada Gazette*, pt.II, C I (1967), 4.
21. Section 14(3).
22. Section 15.
23. See sections 9.04 and 9.07.
24. See sections 9.08 and 10.02.
25. See sections 9.09 and 9.10.
26. In section 9.11.
27. See section 10.02.

28. R.S.C. 1952, c.13, s.21(4).
29. R.S.C. 1952, c.33, s.10(1)(e).
30. Canadian Citizenship Regulations established by P.C. 1954-1190 and amended by P.C. 1955-528; P.C. 1955-1246; P.C. 1956-1079; P.C. 1957-1542.
31. R.S.C. 1952, c.29, as amended, Schedule IV, c.V, s.2(a).
32. R.S.C. 1952, c.122, ratifying the Constitution of the F.A.O., article XXIII thereof.
33. R.S.C. 1952, c.55.
34. R.S.C. 1952, c.284; art. III(2)(b) of the Agreement governing the Status of Visiting Forces found in the Schedule to the Act.
35. S.O.R./64-49, *Canada Gazette*, pt.II (1964), 157.
36. S.O.R./64-249, *Canada Gazette*, pt.II (1964), 643, s.17.
37. S.O.R./64-50, *Canada Gazette*, pt.II (1964), 169, s.6(4).
38. S.O.R./63-297, *Canada Gazette*, pt.II (1963), s.52(2).
39. S.O.R./61-293, *Canada Gazette*, pt.II (1961), 967.
40. C.P., 1954-1915, Canada, S.O.R./1955, pt.II, p.1830, pt.C, C.01.001(b) and (k) and pt.D, D.01.001(a) and (h).
41. In sections 1.153 to 1.155.
42. Alberta, Legislative Assembly, *Rules, Orders and Forms of Proceedings of the Legislative Assembly of Alberta* (Edmonton, 1950).
43. R.S.A. 1955, c.16.
44. S.A. 1958, c.32.
45. See section 4.22.
46. See section 4.26.
47. See section 8.22.
48. See section 9.08.
49. See section 10.03.
50. See section 9.09.
51. R.S.A. 1955, c.297, s.385, as amended by S.A. 1964, c.82, s.43.
52. R.S.A. 1955, c.297, s.386(1).
53. By S.A. 1964, c.82, s.43.
54. *General Motors Acceptance Corporation of Canada Ltd. v. Perozni* (1965) 52 W.W.R. 32, also reported at [1965] 51 D.L.R. (2d) 724; discussed in sections 1.152 and 1.155.
55. In sections 1.156 and 1.157.
56. Victoria, 1955.
57. See section 4.19.
58. See section 4.22.
59. See section 4.26.
60. See section 9.09.
61. An Act to provide that the English Language shall be the official language of the Province of Manitoba, S.M. 1890, 53 Vic., c.14. The statute appears in virtually the same form in R.S.M. 1954, c.187.
62. See sections 1.137 and 2.05.
63. See section 1.138.
64. Manitoba, Legislative Assembly, *Rules, Orders and Forms of Proceedings of the Legislative Assembly of Manitoba* (Winnipeg, 1960).
65. *Ibid.*, rule 103(1).
66. Original French: "Étant donné qu'une très petite minorité des députés parle et comprend le français, on ne fait pas usage courant du français. Chacun des députés de langue française dit quelques mots en français chaque année pour préserver la tradition. Par occasion aussi, quand nous avons des visiteurs particuliers de langue française dans les galeries, ils seraient présentés en français par l'orateur de l'assemblée. Ceci se fait en particulier pour les groupes scolaires qui nous rendent fréquemment visite."
67. See section 4.19.

68. See section 4.22.
69. See section 4.26.
70. See section 5.13.
71. R.S.M. 1954, c.215, s.240.
72. First Session, Twenty-Eighth Legislature, 15-16 Eliz. II, 1966-67.
73. See section 8.22.
74. See section 9.06.
75. See section 9.08.
76. See sections 9.09 and 9.10.
77. See sections 9.07, note 66, 9.08, 9.09, and 9.10.
78. See section 10.03.
79. See section 4.38.
80. See section 8.24.
81. See section 1.08.
82. New Brunswick, Legislative Assembly, *Standing Rules of the Legislative Assembly* (Fredericton, 1963), rule 3.
83. Italics added.
84. New Brunswick, Legislative Assembly, *Standing Rules*, 47.
85. See section 4.19.
86. See section 4.22.
87. See section 4.26.
88. R.S.N.B. 1952, c.74.
89. In Chapter VIII.
90. See section 8.24.
91. See section 9.06.
92. See section 9.08.
93. See section 9.09.
94. See section 10.03.
95. St. John's, 1951.
96. See section 4.19.
97. See section 4.22.
98. See section 4.26.
99. See section 5.10.
100. See section 9.08.
101. See sections 1.116 to 1.131 for period before Confederation, and 1.139 to 1.150 for the period thereafter.
102. In section 1.147.
103. S.C. 1880, 43 Vic., c.25, s.94.
104. See section 1.146.
105. See section 1.147.
106. See section 4.16.
107. See section 4.26.
108. See section 4.22.
109. See section 9.09.
110. *Ibid.*
111. See section 1.06.
112. The question in our letter of September 29, 1965 was, "Is the member permitted to speak in French, as a matter of courtesy or a matter of right?"
113. The question in our letter was, "Is the translation of his speeches done primarily for the convenience of the English-speaking members of the House?"
114. See section 4.19.
115. See section 4.22.
116. See section 4.26.

117. See section 4.38.
118. See section 10.03.
119. See sections 3.03 and 4.10.
120. Alex C. Lewis, *Parliamentary Procedure in Ontario* (Toronto, 1940), 103ff.
121. *Ibid.*, 83.
122. See section 4.19.
123. R.S.O. 1960, c.197, s.124.
124. See section 4.26.
125. See section 4.38.
126. See section 4.22.
127. See section 5.06.
128. R.S.O. 1960, c.361, s.22(1).
129. See section 9.07, note 66.
130. See section 9.09.
131. *Ibid.*
132. See section 10.03.
133. Prince Edward Island, Legislative Assembly, *Rules of the Legislative Assembly of Prince Edward Island, adopted March 24, 1964* [n.p., n.d.].
134. See section 4.19.
135. See section 4.22.
136. See section 4.26.
137. See section 2.01.
138. See section 2.05.
139. Québec, Assemblée législative, *Règlement annoté de l'Assemblée législative*, edited by Louis-Philippe Geoffrion (Quebec, 1941), in which the French part is followed by the English translation.
140. *Ibid.*, rule 1(6) and 2(5).
141. *Ibid.*, rule 142(1).
142. *Ibid.*, rule 146(2).
143. *Ibid.*, rule 422.
144. *Ibid.*, rule 452.
145. *Ibid.*, rule 491.
146. *Ibid.*, rule 608.
147. See sections 3.13 to 3.15.
148. In section 2.01.
149. See sections 3.31 to 3.39.
150. See section 4.22.
151. See section 4.26.
152. See sections 5.11 and 5.12.
153. See sections 5.17 to 5.19.
154. See sections 7.02 and 13.08.
155. See Chapter VII.
156. See section 7.03.
157. See section 8.03.
158. See section 8.04.
159. See section 8.24.
160. See section 9.05.
161. See section 9.07.
162. See section 9.08.
163. *Ibid.*
164. See sections 9.09 and 9.10.
165. See section 9.11.
166. See section 10.03.

167. See Rèlements des Concours Littéraires et Scientifiques du Québec (1964) en vertu de la Loi de 1962 S.Q., c.24, *Quebec Official Gazette*, XCVI (1964), 1326, s.11; and Rèlements concernant les Concours du Prix d'Europe, Order-in-Council no. 1490, *Quebec Official Gazette*, XCIV (1962), 4804, ss.6 and 20.
168. See section 13.11.
169. Saskatchewan, Legislative Assembly, *Standing Orders of the Legislative Assembly of Saskatchewan* ([Regina], 1957).
170. See section 4.19.
171. See section 4.26.
172. See section 4.22.
173. See sections 9.06 and 9.07.
174. See section 9.09.
175. R.S.S. 1965, c.184.
176. An Act to amend The School Act, s.11.
177. See section 1.149.
178. See section 4.16.
179. See sections 4.22 and 4.26.
180. See section 10.03.

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